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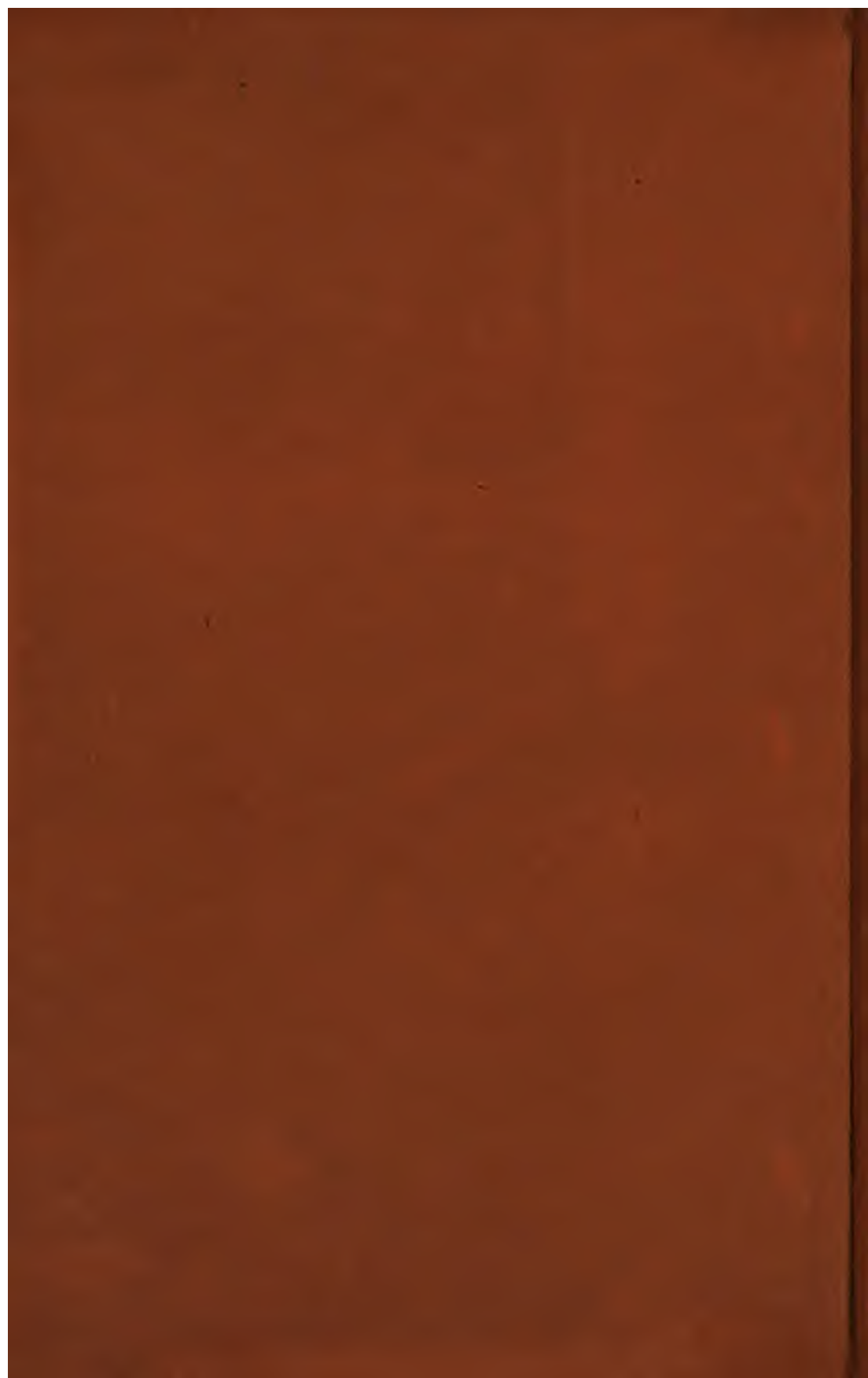
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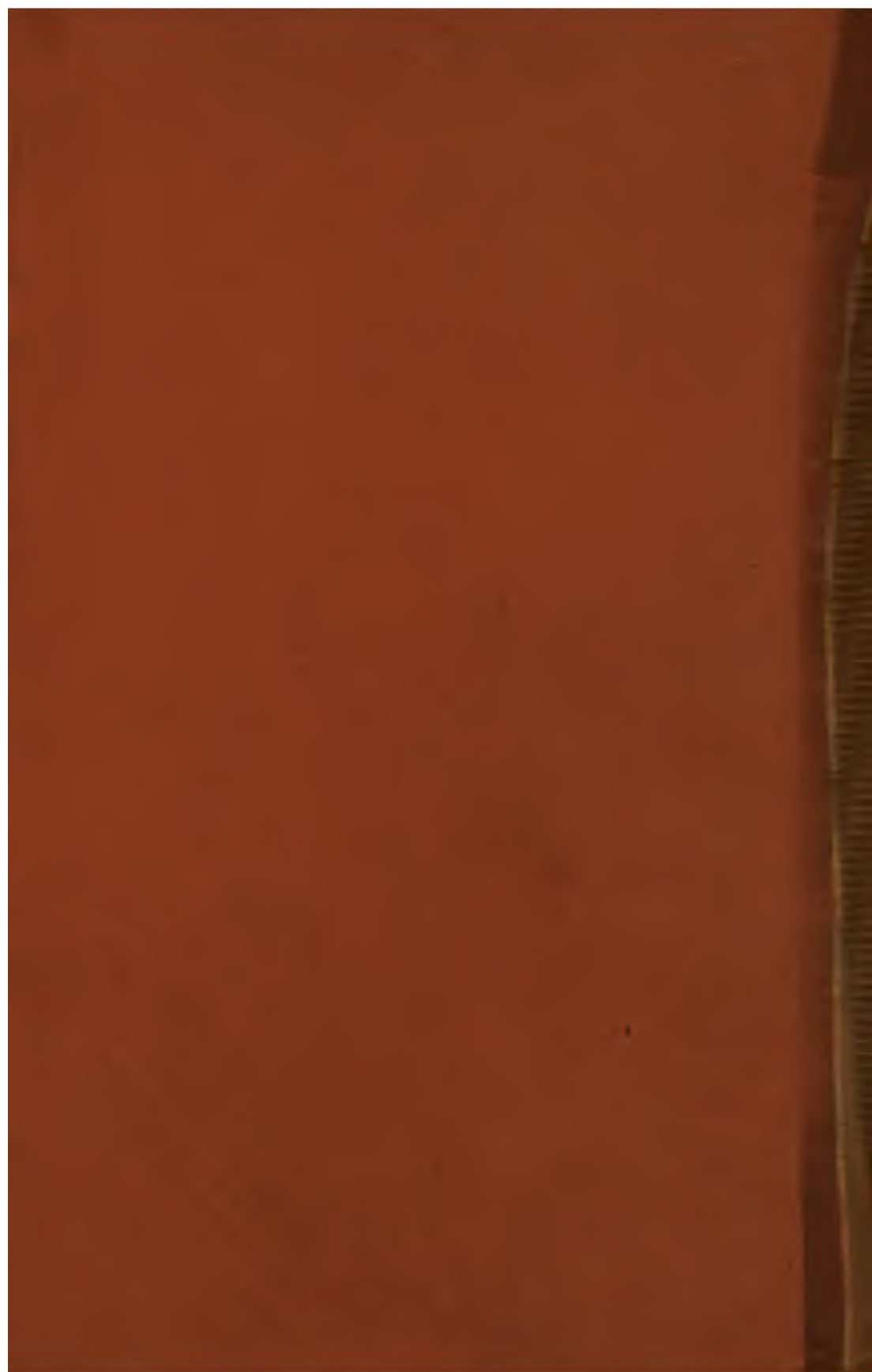
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# REPORTS OF CASES

IN

## CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND.

---

EDITED BY

EDWARD W. COX, Esq., OF THE MIDDLE TEMPLE,

~~Barrister-at-Law.~~

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1858 to 1861.

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NORTHERN CIRCUIT, by R. D. M. LITTLE, Esq.;  
OXFORD CIRCUIT, by R. SAWYER, Esq.;  
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IRELAND, by P. J. M'KENNA, Esq.;

Barristers-at-Law,



REPORTS  
OF  
**Criminal Law Cases.**

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COURT OF CRIMINAL APPEAL.

April 24, 1858.

(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. WALKER. (a)

*Embezzlement—Servant or agent—7 & 8 Geo. 4, c. 20, s. 17.*

*The prosecutors, manure manufacturers, engaged the prisoner, who kept a refreshment house at B., to get orders, which were supplied from their stores at B. under the prisoner's control. The rent was paid by the prosecutors, and prisoner's duty was to collect money, and pay it over at once; he was also to send weekly accounts of sales and receipts. He was to be paid by commission, and was called agent for the B. district. After some time the prisoner signed a proposal to a guarantee society, which stated that his salary was 1l. per year besides commission, and it was proved that the prosecutors had agreed to give this salary of 1l. per year. The prisoner was allowed to get in arrear, and was treated as a debtor in respect of such arrears. Having fraudulently returned the names of three persons as owing money to the prosecutors, when the prisoner in fact had received it and appropriated it to his own use, he was indicted for embezzlement:*

*Held, that he was not a servant within the 7 & 8 Geo. 4, c. 29, s. 47, and that he could not be convicted of embezzlement.*

**T**HE following case was reserved and stated for the opinion of this court by Bramwell, B.:—

The prisoner was convicted before me, at the last Cheshire assizes, of embezzlement, and sentenced to a year's imprisonment with hard labour. The case was made out, if the prisoner was

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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shown to have been a servant within the statute. On this point the evidence was as follows:—

The prosecutors were manure manufacturers. The prisoner kept a refreshment house at Birkenhead, and the prosecutors while he was so doing, engaged him to get orders for the manure, on which orders, they supplied it from the stores.

The prisoner was to collect the money and pay it at once to them; he was also to send them weekly accounts showing what he had sold and what he had received. He was to be paid by a commission.

It did not appear that he had undertaken to give any definite quantity of time or labour to the business, but he was to act in a particular district. And in the printed forms given to him on which to make his returns, he was called, "Agent for the Birkenhead District." The evidence of the prosecutor was, "he was to go through the country and see the farmers and get orders, he was to be continually, during the season, among the farmers."

The following alteration took place in the mode of dealing, namely, from the 1st of August, 1856, to October 9, 1857, in place of the prosecutors supplying customers on the prisoner's orders, they sent large quantities of manure to stores at Birkenhead, of which they paid the rent; these stores were under the prisoner's control, and from them he supplied the customers whose orders he obtained. This mode of transacting the business partly existed before; and it did not appear but what the first mode, or the mixed mode, might have been resorted to by the prosecutors if they found it convenient.

The relations between the parties, evidenced as above mentioned, continued for some time, when the following took place. A proposal was made to a guarantee society to insure the prosecutors in respect of their connection with the prisoner. This proposal was signed by him. It was in a printed form issued by the society, and contained a notice that some amount of salary must be payable, or the society could not insure. The proposal signed by the prisoner stated that his salary was 1*l.* a year, besides commission, which was stated to be estimated at 65*l.* per annum.

The prosecutor swore that at this time he agreed to give the prisoner a salary of 1*l.* a year.

The prisoner was allowed to get in arrear, that is to say, he retained in his hands money he acknowledged he had received, and was treated by the prosecutors as a debtor in respect of it. The alleged embezzlement consisted in this, that he fraudulently returned the names of three persons as having had manure without paying for it, when in fact he had received the sums from them. I left to the jury the question whether or no he was a servant within the statute. But entertaining doubts whether there was any evidence that he was, or whether the question was not for me, and if so, whether I ought not to have decided in the prisoner's favour, I have to request the opinion of the Court of Criminal Appeal thereon.

*McIntyre*, for the prisoner.—The prisoner was not a servant within the meaning of the statute. Here the prosecutors were not in a position to order him to do any particular acts. The evidence showed that he was in the position of an agent or factor. The agreement to pay 1*l.* per annum as salary was merely illusory to satisfy the guarantee company. The substantial remuneration was by commission. This is somewhat like the case of *Reg. v. Goodbody* (8 C. & P. 665), where a drover was employed by a grazier to drive eight oxen to London; his instructions were that if he could sell them on the road, he might, and to take those he did not sell on the road to a particular salesman in Smithfield Market, to be sold on the grazier's account. The drover sold two on the road, and sold the remainder in Smithfield Market himself, and received and applied the purchase money to his own use. And it was held that this did not amount to either larceny or embezzlement. [WILLES, J., referred to *Rex v. Bayley* (2 D. & B. 121.), where the prisoner was a delivery clerk employed at a station common to four different railway companies, and had received 5*s.* for a parcel which came by one of the railways, and accounted only for 3*s.* in respect of the parcel, keeping back fraudulently the remaining two shillings, and it was held that in an indictment for embezzling the two shillings the prisoner might be described as the servant of the four companies, or as the servant of the committee who managed the station.] The present case differs from that, here the prisoner was strictly an agent and treated as such. He was styled "agent" on the printed papers.

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*Giffard*, for the Crown.—The prisoner was a servant within the meaning of the statute. Every servant is an agent in one sense. It is not requisite that a person should be bound to obey every lawful order of another to constitute him a servant under the statute. Here the prisoner's duty was to get orders, receive the moneys due, and pay them over at once to the prosecutors. [WIGHTMAN, J.—Every factor does that.] The question is, whether he was bound to do it by the contract of service. [BYLES, J.—There was no particular time which the prisoner was bound to serve the prosecutors. BRAMWELL, B.—Had the prosecutors a right to say not only what was to be done, but when and how it should be done?] A person employed upon commission to travel for orders and to collect debts, has been held to be a clerk within the 39 Geo. 3, c. 85 (embezzlement), though he was employed by many different houses on each journey, and paid his own expenses out of his commission on each journey, and did not live with any of his employers nor act in any of their counting-houses: (*Rex v. Carr, Russ. & Ry.* 198.) So in *Reg. v. Wortley* (2 Den. C. C. 333), where the prisoner was held to be guilty of embezzlement, the facts were if anything more special than in the present case. The prisoner there agreed with the prosecutor to take charge of certain glebe land, his wife to manage the dairy, poultry, &c. at 15*s.* per week till Michaelmas 1850, and afterwards at 25*l.* a year, and a third of the clear annual profit, after all expenses of rent,

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rate, labour, and interest on capital, &c., are paid on a fair valuation made from Michaelmas to Michaelmas. The prisoner in accounting with the wife of the prosecutor, as he was accustomed to do, on the 4th of October, denied the receipt of two sums which he had received and appropriated them to his own use, and it was held that this amounted to embezzlement, although Michaelmas was the time agreed upon when a valuation was to be made, and the profits were to be ascertained. The jury have found the prisoner guilty, and the question now is, was there any evidence to support that finding? [WIGHTMAN, J.—Suppose a publican employed for purposes of this kind, would he be a servant?] He might or might not, according to the facts. In *R. v. Bayley* it was held that a person might be servant to more masters than one. Besides, by the alteration of the terms between the prosecutors and the prisoner, a new contract of master and servant was created, and a salary agreed upon. [WIGHTMAN, J.—The salary was obviously only for getting the insurance effected.] Why, may not, if parties please, expressly contract that the relation of master and servant shall exist between them? The prisoner's case is similar to that of a mercantile traveller, who has been held to be a servant within the statute. The prisoner was bound to furnish accounts. [BYLES, J.—So is a factor; the law implies that contract for him.] In *Rex v. Ward* (Gow's N. P. 168), it was held that an extra collector of poor rates, his remuneration being a per centage on his collections, was a servant or clerk within the 39 Geo. 3, c. 85; and *Reg. v. Callahan* (8 Car. & P. 154), is a decision to the same effect.

*M'Intyre*, in reply.—In *Reg. v. Wortley*, there was an express contract to serve. In *Reg. v. Carr*, the prisoner had no authority over the goods. Here, too, there was a debtor and creditor account between the prosecutor and prisoner. *Cur. adv. vult.*

#### May 1.—JUDGMENT.

POLLOCK, C. B.—We are of opinion that the evidence in this case did not establish that the prisoner was the servant of the prosecutors, and that the relation shown to have existed between them was rather that of principal and agent. We therefore think this conviction ought to be quashed.

WIGHTMAN, J., concurred.

WILLES, J., *dubitante*.

BYLES, J., concurred with the Lord Chief Baron.

BRAMWELL, B.—I concur in the opinion that the conviction must be quashed; but I think the former decisions, which I cannot take upon myself to say were wrong, rather favour the conviction.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*May 1, 1858.*(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. WALTER HOOK. (a)

*Perjury—Evidence of the falsity—Confirmation.*

*The prisoner, a policeman, on the hearing of an information laid by him against a publican for keeping his house open after lawful hours, swore that he knew nothing of the matter except what he had been told, and that he did not see any person leave the house after eleven on the night in question.*

*Perjury was assigned on the last allegation, and to prove the falsity it was proved that several persons did leave the house after eleven, and the magistrates' clerk who took the information proved that the prisoner on laying it, said that he had caught the publican, and that he had seen four men leave his house after eleven on the night in question, mentioning one of the four by name, he being one of those shown to have left that night after eleven. Two other witnesses proved that the prisoner made similar statements to them. It was also proved that the defendant, on the hearing of the information had acknowledged that he offered to smash the case for 80s. And other evidence was given, showing that the prisoner had intended to get, and did get, money from the publican to settle the case :*

*Held, that this was sufficient confirmatory evidence to support a conviction.*

**T**HE following case was reserved and stated by Bramwell, B. :  
The prisoner was convicted of perjury before me at the last assizes at Chester. He was a policeman, and laid an information against a publican for keeping open his house after lawful hours on the Fast-day.

When called as a witness on the hearing of the information, he swore he knew nothing of the matter except what he had been told, by another person, and that he "did not see any person leave the defendant's house after eleven" on the night in question. Perjury was assigned on this last allegation.

It was material to show it was false, and the following evidence was given :—The clerk to the magistrates who took the information

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proved that the prisoner on laying it, said "he had caught the publican; he (the prisoner) had last night seen four men leave his house after eleven; that one of them he could swear to—it was Williamson; he knew him by his coat."

It was further proved by another witness that the prisoner on another occasion made the same statement to him (the witness), viz., that he had seen four persons leave the house after eleven that night, to one of whom he could swear—it was Williamson; he knew him by his coat.

It was further proved by a third witness, named Williamson, that on a third occasion the defendant repeated this statement, with the variation "one I can swear to; it was your brother, I know him by his coat."

It was proved that Williamson and others did leave the house on the night in question after eleven.

It was proved also that at the hearing of the information the defendant acknowledged that he had offered to smash the case for 30s.

It was proved by another witness that when he (the defendant) talked of laying the information, he said he should make the publican give him money to settle it.

A third witness proved that he heard the defendant offer to the publican to settle it for 1l., saying he was risking perjury; and a fourth proved that the defendant owned he had received 10s. to smash the case, and was to have 10s. more.

It was objected that there was no evidence to go to a jury; that the only witness against the prisoner was himself, and that there was no evidence to show that his unsworn statements were not false. The prisoner was convicted and sentenced to one year's imprisonment and hard labour, but doubts having been expressed on the case, I have to request the opinion of the Court of Criminal Appeal thereon.

*April 24th.*

*M'Intyre*, for the prisoner.—The conviction is wrong. The perjury must be established by two witnesses, or one witness and some confirmatory evidence. In *Reg. v. Muscot* (10 Mod. 194), Parker, C. J., said, "To convict a man of perjury, a probable, a credible witness is not enough: but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath." This rule has been confirmed and acted upon in subsequent cases. In *Champney's case* (2 Lew. C. C. 258), Coleridge, J., said, "One witness in perjury is not sufficient unless supported by circumstantial evidence of the strongest kind: indeed, Lord Tenterden, C. J., was of opinion that two witnesses were necessary to a conviction." See also *Reg. v. Yates*: (1 Car. & M. 132.) The perjury alleged is, that the prisoner swore that he did not see any person leave the house after eleven. And although it was proved that persons did leave the house after eleven, there is no evidence beyond the

prisoner's own statements, not on oath, that he saw them leave. The prisoner's evidence before the magistrate really amounts to this, that he knew nothing beyond what was told to him by some other person, and the facts proved against him are consistent with his evidence on oath being true, and his statements not on oath being false. There is no direct evidence that he saw any person come out of the house after eleven. Then what is there to show which is true, his statement on oath, or his statement not upon oath? A count is bad, which shows merely that the prisoner had sworn directly the contrary on two separate occasions: (*Rex v. Harris*, 5 B. & Ald. 926, and *Rex v. Knill*, in a note to that case.) The principle of Scotch law on this subject is the same as the law in England. Allison's Criminal Law of Scotland, 480, was then cited.

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*H. Lloyd*, in support of the conviction.—The conviction was proper. In *Rex v. Wheatland* (8 C. & P. 238), it was held that the deposition of a witness with confirmatory evidence, was sufficient proof of perjury, assigned upon the evidence of the witness as given at the trial. Here the prisoner's statements not on oath were equivalent to one witness, and the offers to smash the case for money were sufficient confirmatory evidence to show guilt. In *Rex v. Mayhew* (6 C. & P. 315), a letter written by the prisoner was held to be sufficient confirmatory evidence.

*M'Intyre* in reply.—The present case differs from *Rex v. Mayhew*, in this, that the first link in the evidence is wanting, viz., proof of the falsity of the allegation charged as perjury.

*Cur. adv. vult.*

#### JUDGMENT.

**POLLOCK, C. B.**—In this case I believe we are all of opinion that the conviction was right. I think, that if all the cases that have been decided upon the point, had been brought under the attention of the court during the argument, we should hardly have deliberated upon the subject or postponed giving judgment till to-day. It appears that the prisoner swore to a certain fact, and it was proved by more than one witness that on other occasions he had made a statement, certainly not on oath, but a statement quite inconsistent, in fact diametrically the opposite of that which he had sworn to, and in respect of which he was charged with perjury. The argument proceeded very much upon the foundation, that a man could not be convicted merely for opposing an oath at one time to an oath at another time, and though there is a direct authority that he may be, probably it would not be considered right, unless there were some evidence distinguishing the one statement on oath from the other statement on oath, so as to give reasonable ground for believing that the one was true and the other false. The case of *Rex v. Harris* (5 B. & Ald. 929), (in a note), was one where the defendant was charged with perjury, simply because he had sworn at one time one way and at another time the other way; and the indictment concluded simply by stating those two facts, and then saying, "so he was guilty of

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perjury;" and there is no doubt that what may be called the common sense conclusion is, that if a man deliberately and wilfully on one occasion swore that a fact was so, and on another occasion deliberately swore that it was not so, no doubt he must have been guilty of perjury on one or the other occasion. But the Court of Queen's Bench held that it would not be sufficient so to charge it in an indictment, and they arrested the judgment. My brother Crompton, I believe, drew that indictment (so I understand from him), and he drew it from an old precedent with a considerable doubt whether it would do. The Court of Queen's Bench held that it would not do, because it is not sufficient to say that a man must have on one or the other occasion made a false oath. The court said that the jury must find that he committed the offence in one way or in the other; and I believe it was held, in a remarkable case that lately occurred in the Criminal Court, that you could not, on an indictment for murder, allege that the prisoner procured the death murderously and wilfully, and so on, against, &c., either by burning or by stabbing the deceased, it being perfectly clear that he had done so in one way or the other. I allude to a case very well known, in which the prisoner was charged with the higher offence. I remember, in discussing the case with Parke, B., now Lord Wensleydale, he said if six jurymen believed that the death was procured according to the means laid in one count of an indictment for murder, and six were of opinion that the death was procured by the means set forth in another count of the indictment, the man must escape; notwithstanding it was quite clear that he had been guilty of murder in some way or other, for the jury must agree in finding him guilty of some matter stated in the indictment. So in an indictment for perjury, it must be stated what is the false oath, and the jury must find that the defendant was guilty of that which is charged to be perjury. The case of *Rex v. Harris*, merely decided that you could not charge perjury in an alternative way; but in *Rex v. Knill* (in a note to that case), it was expressly laid down, and in point of fact the man was convicted of perjury, merely by charging that one oath was perjured, and proving the falsehood by his having sworn on another occasion quite differently; and in that case Serjt. Jones moved for a new trial, but the court held that the evidence was sufficient, and that it was enough though there was only one witness to prove the contradiction, the contradiction being by the party himself, and that the jury might infer the motive from the circumstances. In another note to *Rex v. Harris*, at p. 939, the opinion of Chambre, J., from his MS. precedent book is appended, and it appears that a conviction took place before Yates, J., at the Lancaster summer assizes in 1764, upon these facts, a man had laid an information on oath before a justice, that three women were concerned in a riot at his mill, and afterwards at the sessions on being examined (having been tampered with in their favour), swore that they were not in the riot. There was no evidence at the trial to prove that they were in the riot, but the defendant's own



information on oath, wherein he had sworn that the parties were in the riot. That led the jury to doubt whether the original information was not probably the truth, it appearing that there was an opportunity of tampering with the man. It was left to the jury to say whether they believed that what he swore before the magistrate was true, and what he swore at the sessions was not true; and if they did, the judge ruled that it was sufficient to convict him. The jury found him guilty on that evidence only, and he was transported. Afterwards Lord Mansfield and Wilmut and Aston, JJ., to whom Yates, J., stated the reasons of the judgment, concurred in that opinion. This doctrine has been a little varied by what fell from Gurney, B., in *Reg. v. Wheatland* (8 C. & P. 238.) There it being proposed to prove an indictment for perjury, assigned on the evidence of the prisoner on a trial at the quarter sessions, merely by the deposition before the committing magistrate, Gurney, B., dissented, and in summing up said, "It is not sufficient that it should be proved that the defendant has, on two different occasions, given directly contradictory evidence, although he may have wilfully done so; but you must, in this case, be satisfied affirmatively that what he swore at the quarter sessions was false; and I am of opinion that that would not be sufficiently shown to be false by the mere fact that the defendant had sworn the contrary at another time; it might be, that his evidence at the quarter sessions was true, and the deposition before Mr. Croft, the magistrate, was false; and if so, he must be acquitted. You will, therefore, consider whether there be such confirmatory evidence of the defendant's deposition before the magistrate as proves that the evidence given by the defendant at the quarter sessions was false." I own I can make no distinction between the statement of the defendant himself upon oath and not upon oath, provided the statement is made seriously and with the intention that it should be taken as true. The charge against the present defendant Hook was perjury in what he had sworn before the magistrate on the hearing of the information. To prove that it was false more than one witness was called to show that on two or three occasions he had stated the exact contrary by word of mouth. As against him the statement is, undoubtedly, as my brother Bramwell during the argument pointed out, to be received as evidence, and it is proved by more than one witness. Then there were confirmatory circumstances, for it was shown that he had made an offer to smash the conviction, and certainly that was very strong to show that what he had sworn was not true. For these reasons I think that the conviction was right. None of the members of the court are responsible for the reasons I have given except myself; but it appears to me to be quite clear, even assuming the case of *Rex v. Knill* as not quite safe to be acted upon, (though certainly it is supported by the Court of King's Bench, as constituted in the time of Lord Tenterden, and also supported, according to the authority of Chambre, J., by the whole Court of King's Bench in the time of

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Lord Mansfield), and that the probability is that no judge would act upon it without some confirmatory evidence, that in this case there is abundant confirmatory evidence; and that therefore the conviction is right.

WIGHTMAN, J.—I am entirely of the same opinion. It appears that the case may be put on a very short ground, which is this—that in order to convict the defendant of perjury, it is necessary that there should be two witnesses, for this obvious reason, that if there is but one oath against another oath, it is altogether in doubt which is true, and therefore two witnesses are required to contradict the oath on which perjury is assigned. But it is not necessary, nor has it ever been held necessary, that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence—if I may so call it—in direct contradiction, as here, where you have one piece of evidence of the defendant himself, who is proved by one witness to have sworn directly the contrary on another occasion, but that alone would not do; and in addition to that, you have the oath of another witness, that that which the prisoner stated before was true. Therefore you have two witnesses, or as I ought rather to put it, instead of two witnesses being necessary to prove each fact alleged as perjury and false, you must have the evidence of two persons in contradiction to what has been sworn to by the defendant; one who could prove, as in this case, that on some other occasion the defendant had stated that which was diametrically opposite to what he had sworn, and you should have the other witness himself to give evidence of that which is directly opposite. You have then two contradictions: you have the contradiction of the defendant himself as deposed to on oath by one witness, and you have the contradiction of another independent witness who speaks to the falsehood of the fact—you therefore have two independent contradictions on oath. It seems to me that the reasonable way of holding is, that you should have two independent contradictions on oath of that which the defendant has alleged—one the contradiction of the witness who states the fact that the defendant himself has alleged, and you should have also the oath of another witness. It seems to me that that is sufficient, and on that ground I am of opinion that the conviction is right.

WILLES, J.—I am of the same opinion.

BRAMWELL, B.—I am of opinion that the conviction is right. The first question in the case is, whether any matter be sufficiently proved, which, if proved, would be enough to convict the prisoner of perjury? Now, the matter proved was his own statement over and over again, which, if true, showed that what he had sworn was false. Well, was that sufficiently proved? Now it does not matter to my mind that you should prove that he had said so on several occasions; it is enough that it was proved by two witnesses that he had said so on one occasion. There was more than one witness to prove that he had on different occasions said that which, if true, showed that he had committed perjury. Well

now, that being so, the difficulty scarcely arises to my mind, that you cannot tell whether the statement not on oath is true, or whether the statement on oath is true. But the answer to that is, there is abundant evidence by which you can tell, because there is plenty of evidence to induce you to give a preference to the unsworn statement over the sworn one. Well then the matter, which, if true, was sufficient to convict him, is sufficiently proved by other circumstances. As I said before, if there be two opposing oaths only, you cannot properly convict a man of perjury, because the only legitimate conclusion to be drawn is that one was false; but when the oath complained of is sufficiently established, and you have other evidence to show that the oath not complained of is true, then consequently the oath complained of is a false one. Whether with reference to the case of two contradictory oaths, the truth of the oath not complained of would have to be proved by two witnesses, I do not undertake to say at the present moment. The case of *Rex v. Knill* goes to show that it would not. Here the case is this; you have a witness to prove that the defendant said he had seen a man come out of the house, and that proves that which, if true, goes to show that the defendant is guilty. Then that it was true is proved by other witnesses, so that the matter is not left in doubt. I think, therefore, the conviction was right.

BYLES, J.—I also think that this conviction was right. The rule of law requiring two witnesses to prove an assignment of perjury, rests on two grounds. First, it would lead to much dissatisfaction, if there was a conviction for perjury where there was only the oath of one man against the oath for another, and nothing more. There is another strong reason, that all witnesses would be constantly exposed to indictments for perjury if the oath of an unscrupulous and vindictive adversary, without confirmatory evidence, was sufficient to commit for perjury. Here the several distinct admissions of the defendant are proved by a plurality of witnesses, and there has been the direct testimony of those witnesses deposing to the truth of the defendant's own statement not on oath. There is therefore enough in the case to show a confirmation, and to satisfy both the spirit and letter of the rule. My Lord Chief Baron has cited, and I agree with him in his remarks thereon, the case of *Rex v. Knill*, where the Court of King's Bench went so far as to say that where there is an admission of the defendant on oath, the defendant may be convicted upon the single testimony of one witness, and that decision seems to be recognised and affirmed in *Rex v. Harris*. For these reasons, I think the conviction was perfectly right.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

May 1, 1858.

(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. CHARLES WEST. (a)

*False pretences—Pretence of existing fact accompanied by a promise.**A fraudulent misrepresentation of an existing fact, accompanied by a promise, e. g., that the prisoner had bought skins at B. and wanted 4l. 10s. to fetch them home, and that he would bring the skins to prosecutor and sell them to him, and that they were worth 8l. or 9l., is a sufficient false pretence within the 7 & 8 Geo. 4, c. 29, s. 53, upon which a prisoner may be convicted, although it appears that prosecutor advanced the 4l. 10s. on the faith that the prisoner had purchased the skins at B. and would bring them to him and sell them to him.*

CASE reserved by the deputy-recorder of Maidstone.

The prisoner, Charles West, was tried before me, upon the following indictment, at the general quarter sessions for the borough of Maidstone on the 6th of January 1858.

The jurors of our Lady the Queen, upon their oath, present that Charles West, on the 8th day of December 1857, unlawfully, knowingly and designedly did falsely pretend to one Harriet Wright, that he, the said Charles West, had bought thirty sheepskins, two bullockskins, and two horsehides at Mr. Bennett's, at Paddock-wood; that he, the said Charles West, had paid 10s. on the said skins and hides, and that he wanted 4l. 10s. to enable him to fetch them by the railway; that he would bring the said skins and hides to the said Harriet Wright and sell them to her; that they were worth between 8l. and 9l., and that Mr. Bennett kept a pack of hounds, and was a gentleman farmer, and lived about a half-a-mile from Paddock-wood; by means of which said false pretences the said Charles West did then unlawfully obtain from the said Harriet Wright, certain money of and belonging to the said Harriet Wright with intent to defraud; whereas in truth and in fact the said Charles West had not bought thirty sheepskins, two

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

bullockskins, and two horsehides at Mr. Bennett's at Paddock-wood; and whereas in truth and in fact the said Charles West had not paid 10s. on the said skins and hides; and whereas in truth and in fact the said Charles West did not then want 4l. 10s. to enable him to fetch the said skins and hides by the railway: and whereas in truth and in fact the said Charles West had not any skins and hides worth between 8l. and 9l. to sell to the said Harriet Wright, and there was no such person as Mr. Bennett who kept a pack of hounds and was a gentleman farmer, living about half-a-mile from Paddock-wood, as he the said Charles West well knew at the time he did so falsely pretend as aforesaid against the form of the statute, &c.

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The evidence, so far as it was material to the present case, was as follows:—

Harriet Wright, a marine store shopkeeper, in High-street, Maidstone, deposed.—The prisoner came to my shop in the afternoon of the 7th December instant. I had known him some little, but very little, before. He said he had been to Paddock-wood to a Mr. Bennett's, and that he had bought thirty sheepskins, two bullockskins, and two horsehides, and loaded them upon a waggon to carry to Paddock-wood station, and that he had paid 10s. upon them to make them safe. Mr. Bennett, he said, was a gentleman farmer, and kept a pack of hounds, and lived half-a-mile from Paddock-wood station. He asked me for 4l. 10s. He said he was to give 7l. for the skins, and that he would bring them, and sell them to me, and he asked me for 4l. 10s. in part payment of them. I told him it was a deal of skins for one man to have, and he replied, it was a bye-place, and no buyer of skins had been there for a twelvemonth. I refused to let him have the money. He said he hoped I would consider it, and that he was going for the skins the next morning by the nine o'clock train, and that he would call upon me in the morning. The next morning he came to me about eight o'clock, and said it would be a great loss if I did not let him have the money, and that it could not make much difference, whether I paid for them at eight o'clock in the morning or at three in the afternoon. I believed his story, or I should not have let him have the money. I then consented to let him have the 4l. 10s., and my daughter paid it to him by my directions. The representation that he had bought the skins induced me to let him have the money. The same day I saw the prisoner about three o'clock in the stock market. I asked him if he had got back. He replied that he had not been, that he had missed the train; I said he had better give me my money back. He said it was at home. I said I will go home with you for it. He replied he had spent some of it. I said you have got that money under false pretences. He replied that he was going for the skins on the following morning. I told him I did not believe he had any to fetch, and that he was swindling me out of my money. He then said he would bring it down between five and six o'clock, but I saw no more of him. He has brought skins to me before, and I have sold them. I expected to make a profit

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by the skins, and I lent the prisoner the money, because I thought he would bring me the skins, and I would not have lent him the money if I had not believed he was going to Paddock-wood to bring me the skins. If he had only told me that he had bought skins at Paddock-wood, unless I had thought he would sell them to me, I would not have let him have the money, nor should I have lent him the money if I had not thought that he had already bought the skins of Mr. Bennett.

Mary Wright, the daughter of the last witness, corroborated her mother's evidence.

Samuel Waghorn, a police constable of Brenchley parish, in which the Paddock-wood station is situated, knows the whole of the farmers. There is no farmer or gentleman in the neighbourhood of the name of Bennett, and is sure he should have known if there had been a person of that name.

I directed the jury, that if they believed the facts stated on the part of the prosecution, to find a special verdict, and they found the prisoner guilty of obtaining the sum of 4l. 10s. upon the false pretences that he had purchased the skins from Mr. Bennett, and would bring them to the prosecutrix, and sell them to her. As I entertained some doubts whether the false pretence, which appeared to be the real inducement to advance the money, namely, the future selling of the skins to the prosecutrix, was within the statute, I postponed the judgment until the next session, discharged the prisoner on recognizances of bail to appear and receive judgment, and reserved the case for the opinion of the Court of Criminal Appeal, upon the following question:—

Whether the pretence used, and which induced the prosecutrix to advance the money, was a sufficient false pretence within the statute?

*Addison*, for the prisoner.—It is submitted that the pretences which induced the prosecutrix to part with her money were not within the statute. The inducement was composed of two things: the misrepresentation of an existing fact, "that the prisoner had bought skins at B.'s," and a future promise, "that he would bring the skins and sell them to the prosecutrix." If those two things are separable, the question arises, did the prosecutrix act on that part only which is a false pretence within the act. But it is submitted that the two things were inseparable, and that the whole transaction amounted merely to a promise of future conduct. This case is on the boundary line between civil and criminal liability. Where a prisoner was indicted for obtaining meat from a butcher under pretence that he would pay for the same on delivery, and would send the money back by the servant of the prosecutor, it was held that this was not a sufficient pretence within the statute 7 & 8 Geo. 4, c. 29, s. 53: (*Rex v. Goodhall*, Russ. & Ry. 461.) So an indictment which alleged only that the prisoner falsely pretended to the prosecutor, whose mare and gelding had strayed, that he would tell him where they were if the prosecutor would give him a sovereign, was held bad: (*Rex v. Douglas*, 1 Moo. C. C. 462.)

[POLLOCK, C. B., referred to *Reg. v. Fry* (1 Dears. & B. 449; 27 L. J. 68, M. C.), which, he said, was the same as the present, a misrepresentation of a fact, accompanied by a promise.] That was a representation of an existing fact relating to a future transaction; besides, no counsel argued on behalf of the prisoner in that case. A pretence that the prisoner intended to marry the prosecutrix, and wanted the money to pay for a wedding suit he had purchased, is not sufficient: (*R. v. Johnson*, 2 Moo. C. C. 254.) If two pretences are laid, and both may operate on the mind of the prosecutor, and one is within the statute and the other not, a conviction cannot be sustained if they are inseparable: (*R. v. Wickham*, 10 Ad. & Ell. 34.) The American authorities show that such a case as the present is regarded in the United States as a breach of contract, and not as a crime: (*The Commonwealth v. Hutchinson*, 2 Parson's Am. Rep. 309; *The Commonwealth v. Drew*, 14 Pickering, 184; Walton's American Crim. Law.)

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*Russell*, in support of the conviction.—Wherever there is a false statement as to a bygone or existing fact, and that is part of the inducement, though accompanied by a promise, the case is within the statute. [He was then stopped.]

POLLOCK, C. B.—We are all of opinion that the conviction ought to be affirmed. It is impossible to distinguish this case from *Reg. v. Fry*, where it was decided that the misrepresentation of a matter of fact, accompanied by a promise, does not prevent the offence being within the statute. The marginal note of that case is, "The prisoner was convicted on an indictment charging her with obtaining 10s. by false pretences, one of the false pretences alleged, being that the prisoner kept a shop, and that the prosecutrix might go and live with her at the said shop, until she obtained a situation. It was proved that the prisoner falsely told the prosecutrix that she kept a shop at N., and promised prosecutrix that she should go home with her until she got a situation, and that the prosecutrix lent the prisoner half a sovereign, which she promised to repay when they got home, but that the prisoner left the prosecutrix as soon as she had got the money, and did not return. The jury found that the prosecutrix parted with the money under the belief that the prisoner kept a shop at N., and that she (the prosecutrix) should have the money when she went home with her." So that there, part of the inducement was the expectation of the money being repaid when she went home with the prisoner, which was on the ground of her keeping a shop. The judgment of the court was, "That the indictment was good, and supported by the evidence. The prisoner falsely pretended that she kept a shop at N., and the prosecutrix was induced by that false pretence to part with her money."

*Conviction confirmed.*

## COURT OF CRIMINAL APPEAL.

May 1, 1858.

(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. FRAMPTON.

*Receiving goods embezzled—Indictment for embezzlement, larceny and receiving.**A. was indicted for embezzling H.'s goods, and for larceny of H.'s goods; B. for receiving goods, the property of H., knowing them to have been stolen. A. was found guilty of embezzling only, and B. for feloniously receiving:**Held, that the conviction of B. was right, for the 7 & 8 Geo. 4, c. 29, s. 47, enacts that every person who has embezzled within the meaning of that section "shall be deemed to have feloniously stolen from his master," and that being so, B.'s offence was properly described in the count for receiving.***C**ASE reserved by the chairman of the Dorsetshire Quarter Sessions:—

The prisoner was tried with two other persons named Wilkinson and Tavender.

The first count of the indictment in the usual form charged Wilkinson and Tavender, as the servants of one Hebditch, with embezzling their master's goods.

The second count charged the same two prisoners with stealing their master's goods.

The third count charged the prisoner Frampton with having been convicted of felony.

The fourth count charged the prisoner Frampton, he having been convicted as in the third count mentioned with feloniously receiving goods, the property of Hebditch, knowing them to have been stolen.

The jury found Wilkinson guilty on the first count for embezzlement, and acquitted Tavender on all the counts; and found Frampton guilty under the fourth count of feloniously receiving.

It was objected in arrest of judgment on behalf of Frampton, that the jury could not find him guilty of receiving, they not having



found Wilkinson and Tavender, or either of them guilty of stealing.

But the case directed the attention of the court to the fact, that the fourth count, although the property charged to have been feloniously received is, in point of fact, the same as in the counts for embezzlement and larceny, is, nevertheless, independent of such counts, being for a substantive felony.

The question reserved was, whether the jury could, under the circumstances, legally find Frampton guilty of feloniously receiving, Wilkinson and Tavender having been indicted for feloniously stealing and embezzling such property, and the prisoner Wilkinson having been found guilty of the embezzlement only.

No counsel appeared for the prisoner.

*Porcher*, for the Crown.—The 7 & 8 Geo. 4, c. 29, s. 47, enacts “that if any clerk, or servant, or any person employed for the purpose, or in the capacity of a clerk or servant, shall by virtue of such employment, receive or take into his possession, any chattel, money, or valuable security, for, or in the name, or on the account of his master, and shall fraudulently embezzle the same, every such offender shall be deemed to have feloniously stolen the same from his master.” This has the effect of constituting the offence specified in sect. 47, larceny: (2 Russ. on Crimes, 168.) Therefore the conviction of Wilkinson on the first count for embezzlement, may be considered as a conviction for larceny, and if so, the conviction of the receiver on the fourth count may be sustained. [WIGHTMAN, J.—Was the fourth count proved, knowing them to have been stolen?] It was, if, as is submitted, you may read “stolen” as “taken.” In *Reg. v. Craddock*, 2 Den. C. C. 31, where the prisoner was indicted in the third count for receiving the aforesaid goods “so as aforesaid feloniously stolen,” and convicted, it was held no ground for arresting the judgment, that he was acquitted on the first two counts, which charged him with larceny of the goods. [WIGHTMAN, J.—There is no ground for arresting the judgment here.]

POLLOCK, C.B.—There is no difference of opinion in the court upon the construction of the 47th section of the statute, that the offence of embezzlement should be treated as the offence of stealing. It is very likely, that as there was no statute making the receiving goods knowing them to be embezzled an offence, this provision was enacted for the express purpose of turning all embezzlements into the channel of larceny, and making but one offence of receiving goods feloniously stolen or embezzled. That being our opinion there is no difficulty in the case, and the conviction is good.

*Conviction affirmed.*

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v.  
FRAMPTON.  
—  
1858.  
—  
*Indictment—  
Receiving.*

## COURT OF CRIMINAL APPEAL.

*April 24, 1858.*(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. FEIST. (a)

*Misdemeanor—Anatomy Act—Disposing of dead bodies for dissection, for gain—Master of workhouse—Relatives requiring bodies to be interred without dissection.**A master of a workhouse, after showing the bodies of deceased paupers in coffins to their relatives, caused the relatives to follow other coffins to the graves, and the appearance of a funeral to be gone through. The relatives of the deceased had not required, that the bodies should be interred without anatomical examination, according to the 2 & 3 Will. 4, c. 75, s. 7 (the Anatomy Act). The master of the workhouse then sent the bodies to Guy's Hospital for dissection, and received therefor sums of money in proportion to the number of bodies sent. After dissection, the bodies were buried. The jury found that the master of the workhouse had caused the appearance of funerals to be gone through, with a view to prevent the relatives requiring the bodies to be interred without anatomical examination :**Held, that an indictment charging the master of the workhouse, in one count, with selling the bodies, in another with taking away the bodies for gain to delay the burial with intent to have them dissected, and in a third with intent to sell and dispose of them, could not be sustained, as the master of the workhouse had lawful possession of the bodies within sect. 7 of 2 & 3 Will. 4, c. 75, and the relatives had made no request that the bodies should be interred without anatomical examination.*

THE following case was reserved by Wightman, J., for the opinion of this court, on the trial of the defendant at the Central Criminal Court.

The defendant was the master of the workhouse at Newington, Surrey, and was indicted for disposing of the dead bodies of paupers who died in the workhouse, for the purpose of dissection, and for gain and profit to himself.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

It appeared by the evidence that the defendant, who was the master of the workhouse of the parish of Saint Mary, Newington, had, in collusion with Robert Hogg, who was the parish undertaker, upon the death of several of the paupers, caused their bodies to be shown to their relatives in coffins, and every appearance of regular funerals to be gone through, when in reality, just before the funeral left the workhouse, other coffins were substituted for those which the relatives had seen, and the bodies were in the evening taken to Guy's Hospital for dissection, all the necessary formalities required by the 2 & 3 Vict. c. 75, for regulating schools of anatomy, having been duly complied with. In no case, did the relatives of the deceased persons require that their bodies should be interred without anatomical examination; and indeed they appear to have believed that the bodies were buried without any such examination. It did not appear, that the defendant made any regular charge to the hospital, or the surgeon, in respect of the bodies supplied from the workhouse; but in the year 1856, he received 19*l.* 10*s.*, and in 1857, 26*l.* from Guy's Hospital, as gratuities for his trouble in going through the formalities, and giving the notices, and obtaining the certificates, in respect of each of the bodies, required by the Anatomy Act, and the amount paid to him was in proportion to the number of bodies supplied. These payments were in contravention of the 7 & 8 Vict. c. 101, s. 31.

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FRIEST.  
1858.  
*Anatomy Act.*

Upon this state of facts, the jury found that the defendant caused the dead bodies of four paupers to be delivered to Hogg, and delayed the burial of them for an unreasonable length of time, in order that they might be dissected in the meantime, and that he did so for gain and profit to himself. They also found, that he caused the appearance of a funeral of such paupers deceased to be gone through, with a view to prevent their relatives requiring the bodies to be interred without being subject to anatomical examination, and that but for such supposed funeral, the relatives of the deceased would have required their bodies to be interred without anatomical examination.

It was objected by the counsel for the defendant that the defendant having lawful possession of the bodies, as master of the workhouse, might lawfully do that which he had done, as no relatives of the deceased persons had required the bodies to be interred without undergoing anatomical examination.

Upon the finding of the jury, however, I directed a verdict of guilty to be entered upon the 5th, 6th, 7th, and 8th counts of the indictment, subject to the opinion of this court whether the verdict so entered upon all or any of these counts is warranted by the before-mentioned evidence and the finding of the jury.

*H. Matthews*, for the prisoner.—The conviction must be quashed, for, firstly, the prisoner is protected by the Anatomy Act; secondly, even if that be not so, the counts on which the verdict was taken, show no offence at common law; and thirdly, they are not supported by the evidence as found in the case. As to the Anatomy Act the only question arises on sect. 7. Section 7

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makes it necessary for the relatives of a deceased person to do a specific act, namely, to require the body to be buried without anatomical examination, before they can deprive a person, in lawful possession of the body, of his right of sending it to the schools. That specific act has not been done here; for the case finds that the relatives did not, in terms, make the necessary requirement. They could have done so, for the prisoner did not keep out of their way in the interval between death and supposed burial, but is stated to have seen them. They omitted, therefore, intentionally to do what the statute makes necessary. Their motive was the mistaken impression that no requirement was necessary; but that motive cannot cure the omission. If the prisoner had directly induced them to abstain from "requiring," by the offer of money, or by any other good or bad motive, it is clear the statute would protect him. It must also protect him when he has indirectly induced them to abstain, by raising a false impression in their minds. If the prisoner had rendered a "requirement" superfluous and unnecessary, by asserting in terms, that he would disregard it, although it were made, even that would not dispense the relatives from making it according to the statute: (see *James's case*, 2 Den. & P. C. C. 1.) Still less is the "requirement" dispensed with, when it is supposed unnecessary, even by reason of a trick. The prosecution must contend, that the intention of the relatives to require, coupled with the prisoner's fraud, which induced them not to do so, is equivalent to the "requirement" made necessary by the statute. But the statute must be construed strictly against penal consequences, and liberally in favour of its object, which is the promotion of anatomical science. To admit of equivalents, would be to introduce a new clause into the statute, and that is contrary to the rule of strict construction. Test it by the rules of criminal pleading. If sect. 7 had been prohibitory in form, that "persons should not send bodies to be dissected, if the relatives required them not to do so," an indictment framed on such a clause must have averred a requirement, and the averment would not have been supported by the facts here found. Test it even by the rules of pleading in civil cases. Here, the "requirement" is a condition precedent, to raise a duty of burying without examination. A declaration framed for the breach of such duty would not be supported by the facts here found, if it averred performance of the condition precedent; it would have to aver an excuse for performance by reason of the fraud. The fraud which prevented requirement, is not therefore an equivalent to the requirement itself.

The court here called upon

*Robinson*, for the prosecution.—It must be assumed that, at common law, the defendant has been guilty of an offence, by selling, for the purpose of dissection, the bodies of paupers who died in the workhouse. [POLLOCK, C.B.—I am not sure of that. It is not unlawful to dissect a body, and how is it an offence to sell for the purpose of dissection?] In *R. v. Cundick*, D. & R. N.P.C. 13, it was held that where a gaoler sold the body of a convict after his

execution, for the purpose of its being anatomised, dissection forming no part of the sentence, he was guilty of a misdemeanor. So also it is an offence to take a body with intent to sell it for such purpose: (*R. v. Gilles*, R. & Ry. 365.) So in *R. v. Young*, cited in *R. v. Lynn*, 2 T. R. 734, it was held that for the master of a workhouse and a surgeon to conspire to prevent the burial of the body of a person who died in the workhouse, was a misdemeanor. [POLLOCK, C.B.—There the body was eventually buried. Suppose a person whose relative has died of some peculiar disease, were to sell the body to an hospital for the purpose of dissection, would that be an offence?] On the authority of the various cases I submit that it would. The Anatomy Act seems to treat every dealing with a dead body for the purposes of dissection as a misdemeanor, unless the formalities prescribed by the Act are complied with. Even for a person to have a dead body in his possession, unless licensed to possess it, would appear to be an offence, and to dispose of it—*à fortiori* to dispose of it for gain and profit—is indictable. No doubt the master of a workhouse may, under the circumstances mentioned in the Act, send it for dissection, but unless the terms of the Act are strictly complied with, which is not the case here, he has committed an offence. [WIGHTMAN, J.—I think you may take it that, but for the protection which the Act affords, the defendant would have committed a misdemeanor. The question is, whether the 7th section protects him.] To bring himself, then, within that protection, the onus is upon him to show that the relatives of the deceased person did not require the body to be buried without first undergoing dissection. I contend that what they did, was equivalent to a requirement to that effect. They go to him in the first instance and inquire when the body will be buried. The defendant informs them it will be three days hence. On the appointed day they go to the workhouse; are shown by the defendant the body of their relative in its coffin, and are told to go into another room and wait until the funeral *cortège* is ready to start. They are summoned half an hour afterwards, and follow what they suppose to be the body they have seen, and they witness its interment; the truth being, that while they were in the waiting-room, the dissected remains of another person have been substituted for the body of their relative, whilst the latter is sent off to the hospital for dissection. All this is surely a requirement, on their part, that the body shall be buried without dissection; since all that they were told, all they did, and all they saw, was quite inconsistent with the body being dissected. It is true they did not in terms “require;” but this is immaterial if their acts necessarily implied it; and such implied requisition was acquiesced in by the defendant. In *R. v. Barnard* (7 C. & P. 784), a person appearing in a commoner’s cap and gown, as though he were a member of the University, which he was not, was held a sufficient false pretence, although no words were used to that effect. Suppose the defendant had said to the relatives, “This body will be buried without undergoing dissection,” and they silently acquiesced, would not

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—  
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—  
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that be a requirement; would not the defendant's assertion of what it was his intention to do, supersede the necessity of their requiring him to do it? But if their conduct was not equivalent to a requirement, can the defendant, when the onus is upon him to show that he is justified under the Act, take advantage of his own wrong, and say, "I have been guilty of a fraud which prevented you from so requiring, and I will shelter myself by alleging that you did not require?" Even if the Act does not mean, that the relatives shall have the opportunity of requiring, which I contend it does, surely it cannot mean that fraud may, with impunity, be resorted to to deprive them of such opportunity. [POLLOCK, C. B.—Suppose that the relatives were induced by the payment of a sovereign to give their consent to the body being dissected, and the sovereign turned out to be a bad one, would the defendant then be guilty of a misdemeanor because he had obtained such consent by fraud?] No: because if, under any circumstances, they had assented to the dissection, it could not be said that they had required the burial without it. Here, not only have they not assented, but what they have done is equivalent to dissent. Take the case of a rape as an illustration. To constitute rape there must be dissent on the part of the woman; where there has been assent, however such assent may have been obtained by fraud, there would be no rape, as in the case where a man had connexion with a woman, she being led to believe that she was in bed with her husband: (*R. v. Clarke*, 24 L. J. 25, M. C.) But where there has been neither assent nor dissent, but the absence of dissent has been produced by fraud, there the crime of rape is committed, as in *R. v. Camplin* (1 Car. & Kir. 746), where the prisoner, having first rendered the woman insensible with drink, took advantage of her then condition, and had connexion with her. There the woman was ignorant of the prisoner's intention, and therefore, in one sense, what he did could not be said to be against her will; but the court held that the prisoner's fraud justified the verdict, that it was without the prosecutrix's consent, and against her will. So here the relatives could not dissent from the body being dissected, because the defendant's fraud had prevented the idea entering their minds. They required the body to be buried without dissection, as far as it was possible for them to do so. Fraud prevented them from doing more, and the defendant cannot allege such fraud in his own justification.

POLLOCK, C.B.—I believe we are all of opinion that this conviction cannot be sustained, for this reason, that what was done by the defendant was done in accordance with the law. He had legal possession of the body, and he did with it, that which the law authorised him to do. It is true that he had every reason to expect that the relatives, if they had been acquainted with what he was about to do, would have required the body to be interred without undergoing anatomical examination, and that he took such steps as would prevent their acquiring such knowledge, and would render any such requirement on their part unnecessary. He, in truth,

acted a lie, and we are all of opinion that if he did what was in the eye of the law a wrong, he should be prosecuted for that wrong. It may be that he was guilty of a conspiracy with the undertaker to prevent inquiry being made; but I do not think it a convenient mode of administering the law upon a criminal statute like this, to say to a man, "You have been guilty of an offence at common law, and to justify yourself, you must bring your conduct within a particular statute," when, in truth, his intention was not to infringe the common law at all, but merely to infringe this particular statute. The offence here is preventing the requirement being made which the statute renders necessary, whilst he is charged with a crime which was never in his contemplation. Suppose he had prevented the requirement being made by giving a 5*l*. note to the relatives, and that the body had been dissected and afterwards been buried, and then it turned out that the note was bad. Surely that would have been no offence.

WIGHTMAN, J.—The only question I intended to reserve at the trial was this: whether the defendant, being *prima facie* guilty of an offence at common law, is notwithstanding protected by the clause in the Anatomy Act, which makes it legal for persons who have the custody of a dead body, to dispose of that body for the purposes of dissection, unless the nearest relatives of the deceased require that it should be buried without dissection. The defendant's answer to the charge is, "I did dispose of the body for the purpose of dissection, and there was no requirement on the part of the relatives that the body should be buried without it." The prosecutor replies, "But there would have been such a requirement except for your fraud." Does then the fraudulent preventing of what the statute puts as a proviso, disable the defendant from setting up the statute, and refer him back to his common law right? No doubt in many cases, fraud will supply the place of that which may be required in express terms; but I think that is not so here. I do not know whether he would be liable to be proceeded against, for the fraud he has actually committed. It is enough to decide that this conviction cannot be sustained. It may be, and it is so found, that but for the fraud, the relatives would have required the body to be interred without dissection. Still they have in fact not so required. The result will probably be, that in future the relatives will specifically require the interment without dissection, but they have not done so here.

WILLES, J.—I am of the same opinion. No doubt at common law it was a misdemeanor to take a corpse out of a burial-ground, even for the laudable purpose of dissection. It was also unlawful to sell a corpse for the same purpose. In modern times the requirements of science are larger than formerly, and we ought to approach the consideration of this question without any prejudice that might arise from the unfeeling or indecent nature of the defendant's conduct. Now the statute in question (the Anatomy Act) has altered the common law, and has rendered that justifiable which was before criminal. It is true the defendant has been

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guilty of a fraudulent trick to prevent the requirement being made, and it was not made. He is a fraudulent person, but has not brought himself within that section. Whether an indictment could not be framed to meet this case it is not for me to say. The 7 & 8 Vict. c. 101, s. 31, is a legislative declaration of what the 2 & 3 Will. 4, c. 75, meant. But this conviction cannot be sustained.

BRAMWELL, B.—I am of the same opinion. I assume that this would be a good indictment at common law. Then the question is, is the defendant protected by the statute? He is so, unless some relative has required that the body should be buried without undergoing dissection. Mr. Robinson admits that no relative has done this in terms, and that, in fact, the idea of dissection never entered the relative's mind; but he contends that the relatives' conduct in requiring the burial, and the defendant's fraud in concealing the intention to dissect, are equivalent to a requirement—but this is not so. I think the Act means that there shall be an affirmative requirement, and here there is nothing but an excuse or a reason for the nonrequirement. The only doubt I have had has been this: the Act seems to say that the relatives shall have an opportunity of requiring, and for this purpose they must have had a reasonable time to do so, and I was at first inclined to question whether this time had been afforded them. But I think it has. A reasonable time would be a time not longer than that which ought to intervene between the death and the burial, and the relatives had the whole of this period to make the requirement. The truth is, a wrong has been done to the relatives by concealing from them by fraud, what they ought to have been made acquainted with. It may be that this would afford a cause of action, but I cannot think that it forms a ground for indicting him in any way.

BYLES, J.—I agree with the rest of the court.

*Conviction quashed.*



## COURT OF CRIMINAL APPEAL.

May 1, 1858.

(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. WILSON. (a)

*Forgery—Certificate of character of seaman—Merchant Shipping Act, 1854.*

*The prisoner for 2s. 6d. paid to him by a seaman, made a fac-simile of a genuine report of the character of a discharged seaman by a shipping master under 17 & 18 Vict. c. 104, s. 176, except that he substituted G., which signified "good," for M., which signified "middling," and delivered it to the seaman. It was found that this was done knowingly and fraudulently:*

*Held, to be an offence within sect. 176, which makes the forging or fraudulently altering any such certificate or report a misdemeanor.*

CASE reserved by Martin, B., April 22, 1858:—

This indictment contained several counts. The first set were founded on an alleged offence under the statute 17 & 18 Vict. c. 104, s. 176, the Merchant Shipping Act, 1854. The second set alleged forgery at common law.

The facts were these:—A seaman named Alfred Goddard had served on board a British ship called the *Maria Santa Maria* on a voyage from Liverpool to the Spanish main and back, and had arrived at Liverpool shortly before the 6th January last.

Upon that day he was duly discharged in the presence of John Laidman (a shipping master duly appointed under the above Act), and the master of the vessel, John Guthrie, who made and duly signed before the said shipping master, in the form sanctioned by the Board of Trade, a report of the character of the said Alfred Goddard, and the shipping master delivered to Alfred Goddard a copy of the report. As the report was made and signed, and in the copy delivered to A. Goddard, opposite to the space for "character for ability in whatever capacity," was put the letter M., which signified that it was middling. A fac-simile of the altered document is annexed to this case.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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This document was headed :

“Certificate of character.

“Character for ability in whatever capacity—G.

“Character for conduct—G.

“I certify the above to be a true copy of so much of the report of character made by the said master on the termination of the said voyage, as concerns the said seaman.

“Dated at Liverpool this 8th day of January, 1858.

“JOHN GUTHRIE, master of the ship.

“J. LAIDMAN, shipping master.”

The letters G. were written, and upon the same paper was the form sanctioned by the Board of Trade of the “Certificate of Discharge,” filled up and signed by the same persons as the document above; and in every respect, except the letter G. instead of M., it is an exact imitation of the original one.

Goddard having heard that the prisoner was in the habit of altering such documents, went to him, and he for 2s. 6d. made and delivered to him (Goddard) a fresh one, being a fac-simile, and a very good imitation of the genuine one, with the exception of the letter G., which signified “good,” being substituted for M. in the place before mentioned.

At his house there was afterwards found the genuine document, but with the letter G. substituted for M.

It appeared as if the prisoner had been dissatisfied with the manner of the alteration, and made out a complete new one for Goddard. A book was found in his house containing a number of printed blank certificates, bound up, one of which had been torn out by him and delivered to Goddard.

The Attorney-General for the county palatine, who conducted the prosecution, expressed some doubts as to whether there was an offence within the 176th section of the statute, and I thought that there was great doubt whether it was forgery at common law: (see *R. v. Hodgson*, 1 Dears. & B. 113.) (b) I request the opinion of the Court of Criminal Appeal on the following questions:—

First, was there an offence against the statute?

Secondly, was there an offence at common law?

If the court be of opinion that there was no offence against either, they will please direct the prisoner to be discharged.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, s. 176) enacts: “Upon every discharge effected before a shipping master, the master shall make and sign, in a form sanctioned by the Board of Trade, a report of the character and qualifications of the persons discharged, or may state in a column to be left for that purpose in the said form, that he declines to give any opinion upon such particulars, or upon any of them, and the shipping master shall transmit the same to the Registrar-General of Seamen, or to such other person as the Board of Trade directs, to be recorded, and

(b) *Reg. v. Hodgson* decided that the forging of a diploma of the College of Surgeons with a general intent to induce a belief that the document is genuine, but with no intention to defraud any one in particular, is not an offence at common law.

shall, if desired so to do by any seaman, give to him, or indorse on his certificate of discharge, a copy of so much of such report as concerns him; and every person who makes, assists in making, or procures to be made any false certificate or report of the service, qualifications, conduct or character of any seaman, knowing the same to be false, or who forges, assists in forging, or procures to be forged, or fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any such certificate or report, or any copy of any certificate or report, which is forged or altered, or does not belong to him, shall for such offence be deemed guilty of misdemeanor."

*Bliss* (*Fitzpatrick* with him), for the Crown, was stopped by the Court.

No counsel appeared for the prisoner.

POLLOCK, C. B.—We are all agreed that the defendant was guilty of forgery within sect. 176 of the statute 17 & 18 Vict. c. 104. It is sufficient to say, that the prisoner altered a document, and thereby made it a false document by substituting the letter G. for the letter M. No reason is required to make out that that act is within the very words of the section. The prisoner, therefore, has been guilty of forgery within that section.

*Conviction affirmed.*

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—  
1858.  
—  
*Forgery.*

## COURT OF CRIMINAL APPEAL.

*April 24, 1858.*

(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. SAMUEL SMITH AND SARAH HIS WIFE. (a)

*Husband and wife—Wife acting under coercion—Wounding—Grievous bodily harm.*

*A wife acting under the coercion of her husband, wrote letters to the prosecutor, pretending that she had become a widow, and requesting a meeting at a distant place. The meeting was granted, and the wife, dressed as a widow, met the prosecutor at the railway-station, and induced him to go to a lonely spot, where the husband fell upon and cudgelled the prosecutor very severely with a stick. Upon an*

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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—  
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—  
Husband and  
wife—  
Wounding.

*indictment charging a wounding with intent to disfigure, and an assault with an intent to do grievous bodily harm, the jury found both the husband and wife guilty, but also found that the wife did not herself personally inflict any violence upon the prosecutor :*  
*Held, that the conviction of the wife was wrong. The conviction was reversed accordingly.*

THE following case was reserved and stated by Channell, B:—

At the last assizes for the county of Gloucester, the said Samuel Smith and Sarah Smith were jointly tried before me and found guilty on a count in an indictment charging them with feloniously wounding one John Leach, with intent to disfigure him; and on another count with intent to do the said John Leach grievous bodily harm.

For the purposes of this case, the conviction of Sarah Smith is to be deemed and taken to be a good conviction, unless the same ought to be reversed by reason of the facts following found by the jury, viz., that the said Sarah Smith was, at the time of the commission of the said offence, the wife of the said Samuel Smith; that she acted under the coercion of her husband, and that she herself did not personally inflict any violence upon the said John Leach.(b)

A verdict of guilty was entered against the husband and wife.

I passed sentence on the said Samuel Smith; I reserved for the consideration of this court the question, whether, upon the afore-said finding, the conviction of the said Sarah Smith was a good conviction, respiting the sentence upon her, and taking bail for her appearance hereafter to receive judgment, if the conviction should be affirmed.

The question for the opinion of the court is, whether Sarah Smith, the wife of the said Samuel Smith, having acted under his coercion, and not having herself inflicted any violence on the said John Leach, can be properly convicted of the offence before mentioned: (see *Cruse's case*, 8 C. & P. 545); (c) 1 Taylor on Evidence, 162, and the cases there cited.)

W. F. CHANNELL.

POLLOCK, C. B.—The jury have disposed of this case by their

(b) The prosecutor and Sarah Smith before her marriage were fellow-servants. After the marriage illicit intercourse took place between the prosecutor and Sarah Smith. This coming to the knowledge of the husband, he formed a plan for revenge, and made his wife write letters to the prosecutor, pretending that she had become a widow, and requesting him to come and meet her by a certain train in the evening. The prosecutor came a considerable distance for the purpose of the meeting, and Sarah Smith met him dressed as a widow, and led him to a lonely spot, where the husband fell upon and assaulted the prosecutor very severely with a thick cudgel. The husband had also a revolver upon his person when taken into custody.

(c) In *Reg. v. Cruse and Mary his wife*, the male prisoner was indicted for that he did maliciously make an assault, and did upon Charlotte Heath then cause unto her bodily injury, dangerous to life, by feloniously beating, striking, and kicking her, &c., &c., with intent to murder. And the wife was charged with aiding, abetting, and assisting her husband. It appeared that both the prisoners were drunk, and that the husband was beating the child, and that he kicked her, and that the wife said, "He might beat the child when he liked, and if he killed the child, she would not come near him." The wife afterwards struck the child. PATTERSON, J., in summing up, said, "With respect to the wife, it is essential not only that she

finding. They have found that Sarah Smith was a married woman; that she acted under the coercion of her husband, and that she herself did not personally do any act of violence to the prosecutor. The conviction, therefore, must be reversed.

*Conviction reversed.*

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*Husband and  
wife—  
Wounding.*

## COURT OF CRIMINAL APPEAL.

*May 1, 1858.*

(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. THORPE. (a)

*Embezzlement—Receipt by servant of agent in the name of the principal  
—Indictment for receiving on account of the agent.*

*The prisoner was the servant of an agent of a railway company, employed to deliver goods according to a delivery-book furnished by the company, and to account for the moneys to the clerk of the company. Having received, in the course of his duty, moneys "for the carriage due to the said railway company," and given receipts in the name of the railway company, he absconded without accounting to any one. The agent made good the deficiency to the company. The prisoner was indicted for embezzlement, and the moneys were laid to have been received by the prisoner on account of his master (the agent):*

*Held, that though the moneys were received in the name of the company, and receipts given accordingly, yet that they were received on account of his master (the agent).*

**C**ASE reserved by the chairman of the West Riding Sessions.

Edward Thorpe was tried before me at the West Riding Sessions of the county of York on the 26th August 1857, on an indictment which, in separate counts, charged him "that he, being the servant of Charles Hardy, on three several days in August 1856 did receive and take into his possession three sums of money, amounting in the whole to the sum of 6*l*., for and in the name and on the

should have assisted her husband in the commission of the offence, but also that she should have known that it was her husband's intention to commit murder. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering the child, you may still find them guilty of an assault. The jury found them guilty of an assault. The court afterwards held that the parties could be jointly convicted of this offence.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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account of the said Charles Hardy his master, and the said money then fraudulently and feloniously did embezzle."

It was proved that Charles Hardy was agent for the Great Northern Railway at Huddersfield, for the purpose of carrying out goods to be there delivered by the company, and that he employed his own servants, and used his own drays and horses, and was answerable to the company for moneys collected by his servants for carriage of goods, and that the prisoner, in August, 1856, was his servant, and that as such servant it was his (the prisoner's) duty to go out with a dray, to take with him goods and a delivery-book, handed to him by James Esplin, a clerk in the service of the Great Northern Railway Company, and to deliver goods according to the directions contained in the delivery-book, and to receive the amount of carriage therein specified as due to the said company, and then to account for the sums so received with the said James Esplin; that he had taken out goods for the said railway company at the time stated in the indictment, and had received from the persons to whom they were directed, for the carriage due to the said railway company, the amounts put opposite to their names and description of goods in the said delivery-book, amounting altogether to the sum of 6*l.*, which sums were paid to the prisoner and received by him as due to the company, the receipts for which were given by the prisoner, and made out in the name of the Great Northern Railway Company.

It was also proved that the prisoner never accounted to the said James Esplin for, or paid over to him these sums, nor to his master Charles Hardy, but absconded; and the amounts so received and unaccounted for by the prisoner, were thereupon paid by Charles Hardy to James Esplin on account of the said company, in pursuance of his arrangement with them in that behalf.

At the close of the case for the prosecution, the prisoner's counsel objected that there was no case to go to the jury, inasmuch as, though the evidence proved that at the time the supposed embezzlement took place the prisoner was the servant of Charles Hardy, as alleged in the indictment, yet it was also proved that the prisoner received and took into his possession the money so said to be embezzled, not in the name and on the account of the said Charles Hardy his master, but in the name and on the account of the Great Northern Railway Company, who were not the prisoner's masters, and therefore that the charge stated in the indictment was not proved. I refused to stop the case, and put these four questions to the jury:—1. Was the prisoner Hardy's servant? 2. Did he receive 3*l.* 3*s.* 9*d.*, one of the sums? 3. Did he fraudulently appropriate that sum? 4. Did he receive the money on account of Hardy?

The counsel for the prisoner objected that the fourth question could not be put, as the evidence proved that the money was received on account of the Great Northern Railway Company, and that there was no evidence for the jury as to the present charge as to that fourth question. The jury, without answering the questions, returned a general verdict of guilty.

The question for the opinion of the Court of Appeal is, whether there was evidence for the prosecution to go to the jury on that fourth question, or whether I ought to have directed an acquittal for the reasons urged by the defendant's counsel.

The prisoner was sentenced by me to six months' imprisonment, but admitted to bail until the opinion of the Court of Criminal Appeal could be had.

No counsel appeared on either side.

POLLOCK, C. B.—We are of opinion that the conviction must be affirmed. The indictment is for embezzling money, which it is alleged that the prisoner took into his possession "for and in the name and on account of his master;" and it was proved that the prisoner's master was answerable to the company for the money received by him. But it was also proved that the money was received by the prisoner in the name of the company; and the doubt which appears to have arisen is, whether, the prisoner having received the money not in his master's name but in the name of the company, the conviction can be sustained. We are all of opinion that the conviction is right. The statute 7 & 8 Geo. 4, c. 29, s. 47, makes use of the words "for or in the name or on the account of his master." Now it is clear that, although the prisoner received the money in the name of the company, he received it on account of his master.

*Conviction affirmed.*

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*Embezzlement.*

## COURT OF CRIMINAL APPEAL.

*April 24, 1858.*(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,  
BRAMWELL, B., and BYLES, J.)

REG. v. JOHN SMITH. (a)

*Forgery—Trade-marks—Printed wrappers for powders—Sale.*

*The prosecutor, Borwick, sold powders called "Borwick's baking powders," and "Borwick's egg powders," wrapped up in printed papers. The prisoner procured 10,000 wrappers to be printed similar to Borwick's, except that the name of Borwick was omitted on the baking powders. In these wrappers the prisoner inclosed powders of his own, which he sold for Borwick's powders. The jury found that the wrappers so far resembled Borwick's, as to deceive persons of ordinary observation, and that they were procured and used by the prisoner with an intent to defraud:*

*Held, that the prisoner could not be convicted of forgery, though he was liable to be indicted for false pretences.*

CASE reserved and stated by the recorder of London:—

John Smith was tried before me at the Central Criminal Court, upon an indictment charging him with forging certain documents, and with uttering them, knowing them to be forged.

It appeared that the prosecutor, George Borwick, was in the habit of selling certain powders, some called Borwick's baking powders, and others Borwick's egg powders.

These powders were invariably sold in packets, and were wrapped up in printed papers.

The baking powders were wrapped in papers which contained the name of George Borwick, but they were so wrapped that the name was not visible till the packets were opened.

It was proved that the prisoner had endeavoured to sell baking powders, but had them returned to him because they were not Borwick's powders.

Subsequently he went to a printer, and representing his name



to be Borwick, desired him to print 10,000 labels as nearly as possible like those used by Borwick, except that the name of Borwick was to be omitted in the baking powders.

The labels were printed according to his order, and a considerable quantity of the prisoner's powders were subsequently sold by him as Borwick's powders wrapped in those labels.

On the part of the prisoner it was objected that the making or uttering such documents did not constitute the offence charged in the indictment.

This point I determined to reserve for the consideration of the Court of Criminal Appeal, and I left it to the jury to find whether the labels so far resembled those used by Borwick as to deceive persons of ordinary observation, and to make them believe them to be Borwick's labels; and whether they were made and uttered by him with intent to defraud the different parties by so deceiving them; directing them in that case to find the prisoner guilty.

The jury found him guilty.

The labels marked "genuine" sent herewith were those used by the prosecutor; those marked "imitations" were the labels the subjects of this prosecution, and reference can be made to them if necessary.

The prisoner has been admitted to bail to await the decision of the court for the consideration of Crown cases upon the foregoing facts.

The following is a copy of the genuine baking powder label:—

PATRONIZED BY THE ADMIRALTY!

---

BORWICK'S  
ORIGINAL  
GERMAN BAKING POWDER,  
FOR MAKING  
BREAD WITHOUT YEAST,  
AND  
PUDDINGS WITHOUT EGGS.  
(*Directions improved by the Queen's Private Baker.*)

---

By the use of this preparation, as the saccharine properties of the Flour, which are destroyed by Fermentation with Yeast, are preserved, the Bread is not only more nutritive, but a larger quantity is obtained from the same weight of Flour.

Bread made with Yeast, if eaten before it becomes stale, ferments again in the stomach—producing indigestion and numerous other complaints: when made with this Powder it is free from all such injurious effects.

The powder is equally valuable in making

PUDDINGS AND PASTRY,

which it deprives of all their indigestible properties; and if dripping or lard be used instead of butter, it removes all unpleasant taste.

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*Forgery—  
Trade marks—  
Printed labels  
—Sale.*

It will keep any length of time and in any climate. In the sick Hospital of the Crimea it was found invaluable.

The public are requested to see that each wrapper is signed

**GEORGE BORWICK,**

Without which none is genuine.

Sold Retail by most Chemists in 1d. 2d. 4d. and 6d. packets, and in 1s. 2s. 6d. and 5s. tins.

Wholesale by GEORGE BORWICK, 24 and 25, London Wall, London.

Directions on the other side.

The following is a copy of the imitation label used by the prisoner :—

PATRONIZED BY THE ARMY AND NAVY !

---

BORWICK'S  
ORIGINAL  
GERMAN BAKING POWDER,  
FOR MAKING  
BREAD WITHOUT YEAST,  
AND  
PUDDINGS WITHOUT EGGS.

(Directions improved by the Queen's Private Baker.)

By the use of this preparation, as the saccharine properties of the Flour, which are destroyed by fermentation with Yeast, are preserved, the Bread is not only more nutritive, but a larger quantity is obtained from the same weight of Flour.

Bread made with Yeast, if eaten before it becomes stale, ferments again in the stomach—producing indigestion and numerous other complaints ; when made with this Powder, it is free from all such injurious effects.

This Powder is equally valuable in making

PUDDINGS AND PASTRY,

which it deprives of all their indigestible properties ; and if dripping or lard be used instead of butter, it removes all unpleasant taste.

It will keep any length of time and in any climate. In the sick Hospital of the Crimea it was found invaluable.

---

Sold retail by most Chemists in 1d. 2d. 4d. and 6d. packets, and in 1s. 2s. 6d. and 5s. tins.

Directions on the other side.

The directions indorsed on the backs of the two labels were *totidem verbis*.

The following is a copy of the genuine egg powder label:—

BORWICK'S METROPOLITAN  
EGG POWDER.

A Vegetable Compound, being a valuable substitute for Eggs. One packet is sufficient for two pounds of flour and equal to four eggs.

*Directions.*—Mix with the flour, then add water or milk, for plum, batter, and other puddings, cakes, pancakes, &c.

PRICE ONE PENNY.

To be had of all Grocers, Oilmen and Cornchandlers.

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*Forgery—*  
*Trade marks—*  
*Printed labels*  
*—Sale.*

The following is a copy of the egg powder label used by the prisoner:—

BORWICK'S METROPOLITAN  
EGG POWDER.

A Vegetable Compound, being a valuable substitute for Eggs. One packet is sufficient for two pounds of flour and equal to four eggs.

*Directions.*—Mix with the flour, then add water or milk, for plum, batter, and other puddings, cakes, pancakes, &c.

PRICE ONE PENNY.

To be had of all Grocers, Oilmen and Cornchandlers.

*M<sup>r</sup> Intyre*, for the prisoner.—This is not a forgery either at common law or within the statute. The gist of the offence was the passing off for genuine baking powder that which was not so; in fact, something that was not so good. This was nothing more than a puff. In *Reg. v. Closs*, 27 L. J., 54, M.C., it was held that a person could not be indicted for forging or uttering the forged name of a painter by falsely putting it on a spurious picture to pass it off as the genuine painting of the artist. This was no more than a printed label, and only differs from *Reg. v. Closs* in that there the name was painted on the picture. In the case of Burgess's sauce labels the Court of Chancery refused to restrain the son from using labels with the father's name upon them. [POLLOCK, C.B.—Suppose a man opened a shop and painted it so as exactly to resemble his neighbour's, would that be forgery?] No. The affixing this label to the powder amounts to no more than saying "This is Borwick's powder." If the prisoner had had a licence, he would have had a right to use the labels.

*Huddleston* (*Poland* with him), for the prosecution.—The jury have found that the labels were made and uttered by the prisoner with intent to defraud. The definition of forgery at common law is "the fraudulent making or alteration of a writing to the prejudice of another man's right:" (2 Rus. on Crimes, 318; 4 Black. Com.

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247; Stark. Crim. Law, 468; 2 East, P. C. c. 19, s. 49, p. 965): and the finding of the jury brings this case within that definition. [CHANNELL, B.—What was a document at common law which could be the subject of forgery? POLLOCK, C. B.—Was a book of which another man made copies?] It is submitted that it was: (Com. Dig. "Forgery.") Letters may be the subject of forgery: (Chit. Crim. Law, 1022.) So a diploma of the College of Surgeons may be: (*Reg. v. Hodgson*, 7 Cox Crim. Cas. 122.) So also the certificate of the examiners of the Trinity House: (*Reg. v. Toshack*, 1 Den. C. C. 492.) So a letter of the character of a servant may be: (*Reg. v. Sharman*, 1 Dears. C. C. 285.) Then this label is a certificate as to the character of an article: (*Reg. v. Closs*; *R. v. Colicott*, R. & R. 201; Stark. Crim. Law, 479, were also cited.)

POLLOCK, C.B.—We are all of opinion that this conviction is bad. The defendant may have been guilty of obtaining money under false pretences; of that there can be no doubt; but the real offence here was, the issuing a false wrapper and inclosing false stuff within it. The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery; the real offence is the issuing them with the fraudulent matter in them. I waited in vain to hear Mr. Huddleston show that these wrappers came within the principle of documents which might be the subject of forgery at common law. Speaking for myself, I doubt very much whether these papers are within that principle. They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things which are essentially different. It might as well be said that if one tradesman used brown paper for wrappers of the same description as another tradesman, he could be accused of forging the brown paper.

WILLES, J.—I agree in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. That does not apply here, for it is quite absurd to suppose that the prisoner was guilty of 10,000 forgeries as soon as he got these wrappers from the printer; and if he had distributed them over the whole earth and done no more, he would have committed no offence. The fraud consists in putting inside the wrappers powder which is not genuine, and selling that. If the prisoner had had 100 genuine wrappers and 100 not genuine, and had put genuine powder into the spurious wrappers and spurious powder into the genuine wrappers, he would not have been guilty of forgery. This is not one of the different kinds of instruments which may be the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false. In cases like the present, the remedy is well known: the prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, and he may also

bring an action at law for damages; or he may indict him for obtaining money under false pretences. But to convert this into the offence of forgery would be to strain the rule of law.

BRAMWELL, B.—I think that this was not a forgery, even assuming that the definition of forgery at common law is large enough to comprehend this case. Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts what the other does—the one is as true as the other, but the one is improperly used. But the question now is, whether the document itself is a false document. It is said that the one is so like one used by somebody else that it may mislead. That is not material, or whether one is a little more true or more false than the other. I cannot see any false character in the document. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery.

CHANNELL, B. concurred.

BYLES, J.—Every forgery is a counterfeit. Here there was no counterfeit. The offence lies in the use of it.

*Conviction quashed.(b)*

(b) Monday, May 10.—The prisoner this day, at the Central Criminal Court, pleaded guilty to the indictment for obtaining money by false pretences, arising out of the same facts. Having been in prison for a month, he was released on his own recognizance to come up for judgment when called upon.

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## Ireland.

## COURT OF CRIMINAL APPEAL.

April 15, 1858.

(Before LEFROY and MONAGHAN, C.JJ.; PIGOT, C.B.; BALL, KEOGH, O'BRIEN, and CHRISTIAN, JJ.; RICHARDS and GREENE, BB.)

REG. v. LYDANE.(a)

*Murder—Admissibility of depositions made on a former distinct charge—Evidence—Motive.*

*The prisoner was tried in 1858, for the murder of M. C. in 1857. In 1856, M. C. had sworn informations against the prisoner for rape. It was proved at the trial that the informations were sworn by her, and subscribed by her in the presence of prisoner, and that then a recognizance was executed for the prisoner to appear at the Assizes, 1856. The prisoner married M. C. before the Assizes, and consequently the charge was not proceeded with. At the trial in 1858, the informations so sworn, and the recognizances, were offered in evidence by the Crown. The judge received them, telling the jury that they were to regard them, not as evidence of the truth or falsehood of the charge so made, but as evidence of the fact of a charge having been so made; and that the facts evinced by the mere existence of those documents might be taken into their consideration upon the question of the existence of a motive:*

*Held, that the documents were properly admitted in evidence for that purpose.*

**T**HIS case came before the court upon a case reserved by Mr. Justice Christian. The case stated was as follows:—Galway Spring Assizes, 1858. The prisoners were tried before me on the 16th of March last, at Galway, for the murder of Mary Lydane, otherwise Conneally, the wife of the prisoner Patrick. He (Patrick) was found guilty and sentenced to be executed on the 11th of May next. John (his brother) was acquitted. The case for the Crown was one entirely of circumstantial evidence. The following is an outline of it: On the 22nd January, 1856, Mary Conneally, who

(a) We are indebted to *The Irish Jurist* for the report of this case.

had been a servant in the house of the prisoner's father, swore informations for a rape against Patrick Lydane. It was proved by John Scully, Esq., the magistrate by whom the informations were taken, and by Thomas Joyce, the Petty Sessions clerk, that the informations were sworn by Mary Conneally, and subscribed by her with her mark, in the presence of Patrick Lydane; and he then executed a recognizance, with sureties, to appear to the charge at the ensuing Spring Assizes for the county of Galway. At the approach of the assizes, however, he married the prosecutrix, and in consequence the prosecution was not proceeded with. Evidence was given of statements made by Patrick, some before and some after the marriage, the purport of which was, that he married to prevent the prosecution; that the marriage would not make her much good; that she and her mother swore falsely against him; that he would give her a short life; that he would have her soul. They never lived together after the marriage, nor did it appear that after the Spring Assizes, 1856, they were ever seen together until the 27th August following; she having gone to live with her mother, he continuing to reside with his father, a considerable distance apart. Late on the evening of Wednesday, the 27th August, 1856, he went to her mother's house, where she then was with two boys, her brothers (the mother being absent). He called her out, and took her away with him in the direction of his father's house. They were afterwards, on the same night, seen together in the neighbourhood of that house. She was missing, and sought for by her mother on the Thursday and Friday—the Lydanes denying all knowledge of her. On the latter day (Friday 29th August) her body was found buried in the sand, on the margin of a lake, more than half an English mile from the prisoner's house. The medical evidence was, that the death was caused by suffocation, or strangulation, not by drowning. There was a small wound on the temple, not sufficient to cause death, but sufficient to produce concussion of the brain. The prisoner, on being arrested on the same day, asserted that he had not seen his wife for the last six months, or since last Spring Assizes. There were other circumstances also in proof; the case presenting, in the whole, a body of evidence which, in my opinion, fully warranted the conclusion at which the jury arrived. The informations sworn by Mary Conneally against Patrick Lydane, upon the 22nd January, 1856, and in his presence, for *rape*, as before mentioned, and also the recognizance entered into by him upon the same day, to appear and take his trial upon that charge, were offered in evidence upon the part of the Crown, and objected to by the counsel for the prisoner. I received them both, but told the jury that they were not to regard them as evidence of anything, save simply of the facts, that before the parties married such a charge had been made, and the accused placed under recognizance to stand his trial for it; that they had nothing whatever to do with the question whether that charge was true or false, but that the facts evinced by the mere existence of these documents might be

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taken into their consideration, along with the other circumstances, specially as bearing upon the question of the existence of a motive which might have prompted the prisoner to the commission of the act with which he stood charge. I request the opinion of the judges whether this evidence was properly received, and whether the conviction and the judgment pronounced upon it are valid.

JONATHAN CHRISTIAN.

*C. W. Blakeney* (with him *Concannon*), for the prisoner, cited *Reg. v. Beuston* (Dearsley Cr. Cas. 405); *Reg. v. Dilmore* (6 Cox Crim. Cas. 52); *Reg. v. Day* (ibid. 55); *Reg. v. Ledbetter* (3 Car. & Kir. 108); *Melen v. Andrews* (Moody & Malins Rep. 336); *Reg. v. Austin* (7 Cox Crim. Cas. 55); *Rex v. Smith* (Russ. & Ry. 339); *Rex v. Radburne* (Leach Cr. C. 457); 2 Russ. by Greaves 888; *Reg. v. Forster* (Dearsley Cr. Cas. 458).

The *Attorney-General*, the *Solicitor-General*, and *West, Q. C.*, for the Crown, were not called on.

LEFROY, C. J.—In this case the court are unanimously of opinion that this evidence was properly admitted. It was not offered in evidence as an information taken under the statute, but was given in evidence as a charge found to be in writing, and which happened to be in writing because the information was made upon a certain occasion. The recognizance of the prisoner was taken upon the same occasion as that on which the charge was made, and was also in writing, and was no more to be regarded than if the statute had never been made. If the charge rested on parol evidence, and the party against whom it had been made had used expressions equivalent to what appeared in the information, all that might have been given in evidence; but nothing of the sort could here be given in evidence, inasmuch as all of it was in writing, and the only proper evidence of the writing was the documents containing the matters which had been so committed to writing. The documents were not given in evidence to substantiate the truth of the charge, but merely as to the fact that they had been made, and that the prisoner had entered into the recognizance. Under these circumstances, the court are of opinion that the evidence was properly received; and, therefore, the conviction must be affirmed.

*Conviction affirmed.*



## CENTRAL CRIMINAL COURT.

SEPTEMBER SESSION, 1858.

*September, 23.*

(Before WATSON, B., and HILL, J.)

REG. v. A. H. COHEN. (a)

9 & 10 Will. 3, c. 41—*Having possession of naval stores, marked with the broad arrow—Possession—Knowledge.*

*On an indictment charging the defendant, under the 9 & 10 Will. 3, c. 41, s. 2, with being in possession of naval stores marked with the broad arrow, it is necessary to show not only that the defendant was possessed of the articles, but also that he knew they were marked with the broad arrow.*

THE defendant was indicted under the 9 & 10 Will. 3, c. 41, for unlawfully having in his possession certain naval stores of the Queen marked with the broad arrow.

From the evidence it appeared that the defendant assisted his father in carrying on an extensive business in London, as a metal merchant. On the day in question two casks were traced by the police to the warehouse of the defendant, and a few minutes after the delivery, the police officers entered and found the casks in the passage unopened. They asked the defendant where he obtained the casks from, and he said from a Mr. Warren, of Portsea. On being opened by the officers they were found to contain a quantity of naval stores marked with the broad arrow. On the desk in the counting house was found a bill for the carriage of the two casks of metal from Portsea, made out to Mr. H. Cohen. On the police officers requesting to be allowed to search the premises the defendant refused. Great resistance was made, and the officers were ejected by the defendant's workmen.

Parry, Serjt. (*Robinson* with him), for the defendant, submitted that there was no evidence on which the defendant could be convicted. The prosecution were bound to show in the first

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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place that the metal was in the actual possession of the defendant; and, secondly, that he was aware of the nature and quality of that which he so possessed. There was nothing in the evidence that made out either proposition. In the first place, the mere deposit of the casks for a few minutes in the passage of the defendant's warehouse was no proof of a possession by him; but even were it otherwise, there was no evidence whatever that he knew what the casks contained. It might be that the moment he had seen the broad arrow marked upon the metal, he would at once have rejected them. The statute, when it speaks of "having in possession," must necessarily mean "knowingly having in possession," otherwise the grossest injustice would result. *Reg. v. Wilmett* (3 Cox Crim. Cas. 281) supported this view: (Foster's Cr. Law, 439); *Reg. v. Banks* (1 Esp. 145).

*West* (with him *Sleigh*), for the prosecution.—The word "knowingly" used by Mr. Justice Coltman in that case, has reference simply to the having in possession, and there is abundant evidence for the jury of such a knowledge here. The casks had been for some minutes in the warehouse, and a bill for the carriage of them was on the desk made out to the defendant or his father. This would be also evidence for the jury, coupled with the resistance to any search, of the defendant's knowledge of what the casks contained; but it is submitted that it is unnecessary to show any such knowledge. The fact of the possession of such articles is sufficient under the statute, and it is for the defendant to justify the possession by showing, if he can, a certificate from the commissioners authorising it.

*Parry*, Serjt., was stopped in reply.

WATSON, B.—I am of opinion that it is necessary in order to convict a person under this statute of having naval stores marked with the broad arrow in his possession, to show not only that he had them in his possession, but that he also knew the nature of the articles, and that they were marked with the broad arrow. The statute is no doubt couched in very general terms; it does not state in so many words that he must have them in his possession "knowingly," but that must be the true meaning of the statute. The word possession imports knowledge of that which is possessed. As to the question of possession, if it were necessary in this case, I should leave it to the jury to decide it, with the observation that although the casks were brought to the prisoner's premises, there was no evidence of the terms on which they were sent, nor was any time given for examination or for exercising any discretion as to returning or rejecting them. The case of *Reg. v. Wilmett*, before Mr. Justice Coltman, is precisely on all fours with this, and specifically points to a knowledge of the mark being there, otherwise there could be no conviction. This view appears to me to be one of sound law and sound sense, and gives the only reasonable interpretation to the statute. In my opinion it is necessary, in point of law, to show that the defendant did know that the articles had the broad arrow upon them, supposing it to be proved

that they were in his possession, and there is no reasonable evidence to go to the jury of any such knowledge.

HILL, J.—I am of the same opinion. It is no offence under the second section of this statute, unless the person charged had possession of the goods knowing them to be marked with the broad arrow. This is made clear by a reference to the recital in the first section. The possession in the second section is put in exactly the same category with the concealing, which is a positive act done by the individual in order to constitute the crime. In my opinion it is necessary to show that the person sought to be fixed with the crime, under the second section, had a knowledge that the goods were marked with the broad arrow, and if he was ignorant of that fact he is not guilty of any offence within the meaning of the statute. The application of common sense to the construction of the statute shows that this must be so. If a couple of casks of old metal obtained from ships contained one thousand pieces, and one piece only bore the objectionable mark, could it be said that the person to whom the casks were sent was guilty of any criminal offence before he had opened the casks and seen the metal; and yet, if this application of the statute is insisted on, the Crown must go the whole length of contending for that absurdity. It appears to me, therefore, to be only applying plain common sense to the construction of this statute, to hold that no offence is committed under the second section unless it is shown that the individual in whose possession or custody the goods were, knew that they were marked with the broad arrow.

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*Not guilty.*

*Sleigh and West, for the prosecution.*

*Parry, Serjt., and Robinson, for the defendant.*

## Ireland.

## COURT OF CRIMINAL APPEAL.

May 22, 1858.

(Before LEFROY, C.J., MONAHAN, C.J., PIGOT, C.B., BALL, KEOGH, CHRISTIAN, and O'BRIEN, JJ., PENNEFATHER, RICHARDS and GREENE, BB.)

REG. v. BURKE. (a)

*Evidence—Contradiction on collateral matters.*

*A witness was called on behalf of a prisoner; before the witness was sworn he professed an inability to speak English. No question was then raised on the fact by the counsel for the Crown, and accordingly the witness was sworn in Irish, and gave his evidence in that language through an interpreter. On cross-examination he was asked whether, on a recent occasion, he had not spoken in English to two persons who were present in court, and shown to witness. He denied the fact, and those two persons were called by the Crown to contradict the statement so made, and their statements were sent to the jury as evidence.*

*Held, that such evidence was inadmissible to show that the witness had made such a statement.*

THIS came before the court upon the following case, reserved by Mr. Justice O'Brien, for the opinion of the court. "The prisoner was tried and convicted before me at the last Mayo assizes, for a rape upon Margaret Sheridan, on the 7th October, 1857. Margaret Sheridan was sworn and examined in Irish, and stated, amongst other things, that she and the prisoner were at the time in the employment of a man named Walsh; that immediately before the offence was committed, she and the prisoner, and a boy named Martin Thornton, were working together in Lord Kilmaine's garden; that she went into the garden house to warm a young child of Walsh's (who it appeared was about four or five years old); that the prisoner followed her into the house, and turned out the child, and then committed the offence against her will; that she cried out; that Thornton came into the garden house immediately after, and made some jesting observations to the prisoner. She also stated that before that time she used to sleep in Walsh's house, but that on that evening she went to sleep at the

(a) We are indebted to *The Irish Jurist* for the report of this case.

house of her aunt, Judith Lize, and made a complaint to her, and went next morning to a magistrate, and made her complaint to him, and was examined by Dr. Twiss, and did not afterwards return to Walsh's house or employment. Judith Lize and Dr. Twiss were also examined by the Crown. The prisoner's counsel addressed the jury, and Martin Thornton was produced as a witness for the prisoner. He stated he could not speak English, and was accordingly sworn and examined in Irish, through an interpreter. He deposed amongst other things, that when he and the prisoner and Margaret Sheridan were working in the garden on the day in question, the prisoner went into the garden house, to warn Walsh's son, that Margaret Sheridan then followed the prisoner into the house, and that he, the witness, went into the house in two or three minutes after. The statements of the witness of what subsequently took place, were quite in contradiction of the evidence of Margaret Sheridan, and, if true, would have been strong grounds for the acquittal of the prisoner. On being cross-examined by the Crown counsel, Thornton again denied that he could speak English, and being further cross-examined as to whether he had not within the last few days spoken in English to two girls (Sarah Anne Gorman and Bridget Reilly, who were then in court, and sworn witnesses) and sung in their presence, in English, a song called "The Heights of Alma," he denied that he had spoken to them in English, or that he had sung said song at all in English or in Irish. Thornton was also cross-examined as to whether he had not been the night before in company with the prisoner, (who it appeared was out on bail to stand his trial), and Thornton stated in reply, that he had not been at all with the prisoner the night before, or since he, Thornton, came into Castlebar, and he also stated that he was no relation of the prisoner. The case for the prisoner having closed, said Sarah Anne Gorman was produced, and sworn as a witness on the part of the Crown, and was asked by the Crown counsel as to Martin Thornton's having within the last few days spoken to her in English, and sung said song in English in her presence. The prisoner's counsel objected to this examination and evidence, before the evidence was given, but did not press his objection, or call upon me to reserve any question, or take any notes respecting it. I allowed the examination of Sarah Anne Gorman to proceed, and she stated that she and Thornton had been lodging for some days previous in Mr. Kirby's house in Castlebar, and that on the night before last, Thornton had sung said song in English in her presence, and had spoken to her in English. Thornton repeated his denial of his having sung said song. She also stated that, during the preceding day, she had seen the prisoner several times in company with Thornton, in Mr. Kirby's house. Bridget Reilly was also then examined as a witness for the Crown, and stated she also lived at Mr. Kirby's house, and that during the last three or four days she had heard Thornton singing said song in English, and that he had spoken to her in English the evening before and previously, and that she

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had seen the prisoner and Thornton talking together the day before. The prisoner's counsel then addressed the jury as to the evidence of Sarah Anne Gorman and Bridget Reilly. The jury found the prisoner guilty, and I am of opinion that their decision, between the conflicting evidence of Margaret Sheridan and Martin Thornton, was much influenced by the contradiction of Thornton's statement, as above mentioned, by Sarah Anne Gorman and Bridget Reilly; on which contradiction I observed in my charge. I sentenced the prisoner on a subsequent day, during the assizes, to three years penal servitude. No application was made to me to reserve any question as to the admissibility of the evidence of Sarah Anne Gorman or Bridget Reilly until after the termination of the Mayo Assizes, and after the commencement of the Galway Assizes, when I was applied to by the prisoner's counsel to reserve as to the admissibility of such evidence, for the opinion of the judges under 11 & 12 Vict. c. 78. I deferred deciding on the application until those acting for the Crown were apprised of it, but in consequence of a communication made by me to the Government the execution of the sentence has been delayed, and the prisoner remains in the gaol of Castlebar. The Crown counsel contended that the evidence was admissible, and also objected to my reserving the question under the statute, in consequence of the lateness of the period at which the application was made. I beg therefore to request the opinion of the judges, whether the evidence given by Sarah Anne Gorman and Bridget Reilly, to contradict the statements of the witness Thornton, as above mentioned, was properly received, and whether the conviction and the sentence pronounced upon it were valid; and also whether under the foregoing circumstances, the question could be reserved under the statute, as in case the judges be of opinion that the evidence in question should not have been received, but that the question could not be reserved under the statute, I think it would be a case for the recommendation of the prisoner to the Crown.

"JAMES O'BRIEN."

*George Malley*, for the prisoner, cited *Alcock v. Exchange Insurance Company* (13 Q.B., 292); *Attorney-General v. Hitchcock* (1 Exch. 93); Taylor on Evidence, 1120.

The *Solicitor-General* (with him *R. P. Lloyd*), for the Crown, cited *Reg. v. Watson* (2 Stark. 157); *Thomas v. David* (7 C. & P. 350); *Lord Stafford's case* (7 Howell's St. Trials, 1400); *Carpenter v. Wall* (11 Adol. & El. 803); *Queen's case* (2 Brod. & Bing. 711.)

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The judges differing in opinion, O'Brien, J., first delivered judgment.

O'BRIEN, J.—I may observe, that the question involved in the case is one of considerable importance as affects the administration of justice in those parts of this country where many persons profess not to speak or understand the English language, and are examined in Irish; and it is especially important with reference to

cross-examination, the great value of which arises from the demeanour of the witness, and the hesitation or fairness with which he answers questions unexpected by him, and put suddenly to him, and his demeanour while being so cross-examined is powerful with the jury to judge of the credit which they ought to give to his testimony; and it is plain that the value of this test is very much lessened in the case of a witness having a sufficient knowledge of the English language to understand the questions put by counsel, pretending ignorance of it, and gaining time to consider his answers while the interpreter is going through the useless task of interpreting the question which the witness already perfectly understands. To any one who has been conversant with trials, whether criminal or civil, the importance of this, and the materiality of the fact as to the language in which the witness is to be examined, is so well known that it is unnecessary for me to make any further observations on it. Now, if this evidence be rejected, is the proposition to be laid down, that a dishonest witness, by pretending ignorance of the language with which the counsel, the judge, and the jury are acquainted, is to be allowed such an undue advantage for himself and for the party, whether plaintiff or defendant, whether prosecutor or prisoner, for whom he is produced? The importance and materiality of this has been admitted in the progress of the argument, and it was suggested that even though it should be decided that the course taken in this instance was wrong, yet that another course remained open; that the judge might take upon himself the office of instituting this inquiry, and that before a witness is examined to the facts of the case he might be examined as to his knowledge of the language, and that not only the witness himself, but other witnesses also, might be produced, as has been suggested, to contradict his testimony upon this subject. The judge would have, in such a case, to decide upon the question, and determine whether he will give credit to the man's representation of his ignorance, accept or reject it. I think it evident that if the evidence is receivable, the course proposed is open to some serious objections. Such a course would be more objectionable than the subsequent examination of witnesses to contradict the party as to his alleged ignorance of the language. If the course is not allowed, the administration of justice is left exposed to this difficulty, that a witness to an important part of the case may, by firmly denying his knowledge of the English language, give his testimony in a manner which would give him an advantage which he is not entitled to, and would not otherwise possess. Now, as to the objection, which is, that no matter how inconvenient it may be, or whether there may be a failure of justice in particular cases, the objection is, that there is a rule of law against the reception of this evidence, for, as an argument for its rejection, a general rule of law is relied on, which excepts the giving of evidence to contradict a witness upon irrelevant and collateral statements, not going to prove immediately the guilt or innocence of the prisoner. Now the materiality of the answer

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in this case cannot be denied, but the question is, is it within the rule to which I have already referred, collateral and irrelevant to the issue? The rule which has been adopted, and the reasons of it, are stated by Mr. Taylor in his work on Evidence, at page 1120 of the second edition, as follows: "With respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down, that if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot. It becomes, then, necessary to ascertain what matters connected with the witness are or are not relevant; and here, in addition to what has been cited in a former chapter, it should be observed, that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct be not connected with the cause or the parties. Therefore, if a witness be questioned, on cross-examination, respecting the commission of crimes by him on some former occasion, his answers, except in the case of a former conviction, must be taken as conclusive. This rule is founded on two reasons: first, that a witness cannot be expected to come prepared to defend all the actions of his life; and next, that to admit contradictory evidence on such points would, of necessity, lead to inextricable confusion, by raising an almost endless series of collateral issues. The rejection of the contradictory testimony may, indeed, sometimes exclude the truth, but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a contrary rule to prevail." Those are the rules laid down by Mr. Taylor; but still it is a rule that leaves untouched the question, what is within the cases irrelevant or collateral, for the purpose of excluding the contradictory evidence. Now, we find that in several instances statements of a witness as to matters not the transactions the subject of investigation, not connected with the guilt or innocence of the prisoner, have been admitted, for reasons to some of which I shall now advert. It is a rule that has been applied from time to time, and it would be seen, by reference to the cases, that it is based on no other grounds than the two to which I have already referred—the inconvenience of several issues and the injustice to the prisoner of calling on him to give evidence as to matters which he had no reason to expect he would have been questioned upon. I admit there are no cases in which evidence like this has been received; but, on the other hand, there are none in which it has been rejected; and then we must examine the cases in order to ascertain whether the exceptions apply in this instance, whether the reasons of public justice, and the due administration of the law, and its importance in the investigation of truth, do not make this a case in which the contradictory evidence ought to be admitted. Now, I have already stated what Mr. Taylor has mentioned as the result of the authorities. In the very next page he goes on to state, "Whether questions respecting the motives, interest, or conduct of the witness, as connected with the cause, or with either of the



parties, are irrelevant, is a point on which the authorities differ. Now, let us consider one case in which the evidence has been rejected; I mean where a witness is asked whether he committed some crime at some former period of his life, and there his answer is not to be contradicted. The fact of his having committed the crime is not connected with the transaction in question at the trial; it has no more connection with even the evidence given by him than so far as the circumstance of his having committed some crimes, or been guilty of some dereliction of moral duty, on some former occasion, may or may not affect the jury in the opinion they may form of the witness. But suppose the witness to answer in the affirmative, why, nothing would be altered in the procedure of the trial; the matter would go on on the fact. It is hard to say whether it would affect the credit attached to his evidence; but I will ask, whether, if the witness who comes, and has stated his ignorance of the English language, and has accordingly given his sworn testimony in Irish, and all his answers are taken on the faith of his ignorance of English, if it should turn out that his whole conduct on the trial has been a fraud on the administration of justice, can his conduct be compared with that of a criminal who has, at some distant time, committed some crime? Another reason given is, that it is unreasonable to expect that a witness will come prepared to answer for all the actions of his life. Can that be said in the case here? A witness is produced with the statement that he is an Irish witness: his whole evidence is given on that assumption; and can it be contended that he has a right to complain of being taken unexpectedly, if he is interrogated as to that which is the foundation of his whole testimony? There is another class of cases in which that testimony has been admitted. You are allowed not only to examine or cross-examine a witness as to his relationship with either of the parties, but you are also allowed, if he denies his relationship, to contradict his denial; because, it is said, if you prove his relationship to either party, you prove a state of interest from which the jury may infer a bias, the existence of which may induce him to give a statement different from the truth. Thus there, for the sake of this double contingency, as I may call it, you are allowed to bring a witness to contradict the statement made by the witness. I do not understand that because, as has been said by the counsel for the prisoner, the witness's reluctance to give his evidence in the English language may arise from this, that though he may understand that language, still he may not be familiar with it, and that want of familiarity may be such as to render him reluctant to give his evidence in it; and, therefore, it may be said, that you have no right to assume that his denial is made for the purpose of bias. But the very account of the witness's knowledge of the language may be an important matter to consider, in order to decide whether his denial of the knowledge of it arises from his want of knowledge, or from bias. If it was shown that the witness had been examined and cross-examined on former trials, would not that be a powerful circum-

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stance with the jury, to establish the existence of bias; and is it not inconsistent to say, that you are to admit contradictory evidence to prove a bias, which may possibly exist, and that where all materials exist to show it you cannot. I confess I do not see the difference between the case of *Thomas v. David* (7 C. & P. 350), and that of a witness objecting to give his evidence in English and denying his knowledge of that language, because supposing his knowledge and familiarity with it to be sufficient to enable him to give his evidence in English, that would be a circumstance from which to infer bias, and in order to decide that, evidence must be produced to the jury, and then it is for them to say whether the denial arises from bias or not. Well, there is another class of cases in which this contradictory evidence has been received, and that is in the case of a witness having tampered with other persons. There can be no doubt that the fact of his having tampered, is not connected with the guilt or innocence of the prisoner; it is idle to say, that, though it discredits the witness, it is more or less connected with the case; but how is the prisoner to be affected by it? The question is as to the witness; if he admits the charge the matter is at an end; if he denies it, and his denial is contradicted, it is for the jury to estimate the value of his testimony on the main case; that principle was acted on in *Lord Stafford's case*, and the doctrine was frequently recognized in the case of the *Attorney-General v. Hitchcock*, in 1 Ex. R. at p. 94, where it was admitted by the judge, that if the evidence had been offered to show that the witness had received a bribe it would have been admissible. Although not connected with the matter which was being tried, it is connected with it in this manner, that it materially affects the prospect of arriving at the truth; and if the evidence was considered admissible in that case, for the purpose of contradicting the witness, I do not see why the same principle is not to be extended to the case before the court, where, I repeat, that I know nothing more important than that the whole evidence as taken from the witness is based upon the truth of what he has sworn to, his ignorance of the English language. Now, I have mentioned the case of the *Attorney-General v. Hitchcock*. In that case Chief Baron Pollock lays down the rule in terms I think too general. He there says, at page 99, "My view has always been, that the test whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence; if it have such a connection with the issue that you would be allowed to give it in evidence, then it is a matter on which you may contradict him." I think that it is too narrow a test for the admissibility of the evidence; the Chief Baron goes on, "or it may be as well put, or perhaps better, in the language of my brother Alderson, this morning, that, if you ask a witness whether he has not said so and so, and the matter he is supposed to have said would, if he had said it, contradict any other part of his testimony, then you may call another witness to prove that he had said so, in

order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness-box is not true." In this case the contradiction is one calculated to affect a material part of the testimony, but does it not do more? Does it not qualify the whole of the testimony? I do not think that the dictum of Baron Alderson can be relied on to push the rule to the extent sought. It cannot be said that the statement in question is entirely immaterial, or not one which, in the words of Baron Alderson, the contradiction qualifies or contradicts. Then we have to consider the question on the grounds of the alleged inconvenience; in fact, can there be said to be any inconvenience here with respect to the witness himself? Well then, Baron Alderson refers to the question of inconvenience; and Baron Rolfe, now Lord Cranworth, says, "Some line may be drawn, and I take it the established rule is, that you may contradict any portion of the testimony that is given in support on contradiction of the issue between the parties." I shall now only refer to one class of cases in which the evidence has been admitted. A witness is asked whether he has ever given a different statement of any part of the transaction in question, and he answers that he has not; in such a case he is allowed to be contradicted; why? Not that the fact of the former statement would be evidence against the parties, but the purpose is to contradict the witness. It would be endless to say this, that upon every question that a witness is asked upon cross-examination, the contrary of what he states may be established by evidence. It is necessary to lay down some rule. As to the words "collateral and irrelevant," I have shown how much they may be qualified by applying them to things affecting the character and conduct of the witness connected with the parties to the case. Well now, I have, I think, shown that none of the cases in which this evidence has been rejected is identical with the present, and that we may without encroaching on the rule,—without any inconvenience arising from trying several collateral issues—without exposing the witness to the danger of being taken by surprise, we may engraft this exception on the rule to which I have referred. With regard to the course proposed, that this examination should be conducted by the judge, I do not offer any opinion on the legality of it; I think the prisoner might complain of the hardship which he would be under if the course were adopted; the judge goes into the inquiry in the hearing of the jury; if he rejects the witness, the prisoner is deprived of the chance of the jury believing the evidence which the judge disbelieved, while if the judge believed the witness, the jury, by the inquiry, may be led to disbelieve him; and it is idle to say that they would not be influenced by what they have heard, and that, the judge may get rid of it by bidding them expunge from their minds all that they have heard in the early part of the case. I think that would be a course more productive of inconvenience than the other, because the number of issues would remain still, the witness would be just as unprepared,

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and I think the prisoner at greater disadvantage than here, where if the jury hear the witness contradicted, they still are judges of the weight they are to attach to this testimony. There is one other class of cases in which the witnesses are objected to on the ground of inconvenience. It was formerly held that that should be done before the examination in chief; I believe it is now settled, even before the recent acts, that if at any period of the trial an objection appeared to the evidence, that the evidence should be expunged; here that course was not resorted to, and the judge did not feel himself called on to express his opinion as to the impression on his own mind with respect to the evidence, and the whole was left to the jury. I cannot conceive anything more serious in those parts of the country where the Irish language is generally spoken, than that a witness should be able, on his own representation, uncontradicted, to place himself at such an advantage over the jury, the counsel, and the judge. If the inquiry is to be gone into, I cannot see why it should not be done as in the present case, and, therefore, I have come to the conclusion that this evidence was rightly received upon the trial.

CHRISTIAN, J.—I am sorry that I feel constrained to come to a conclusion different from that arrived at by my brother O'Brien, because I entirely concur with him in the importance of the question, and in the strong observations which he has made as to the mischiefs which may in some cases arise from the rejection of this evidence; but I am of opinion that this evidence ought not to have been received, having regard to the stage of the trial at which, and the purpose for which, the evidence was offered. Now the facts which give rise to the question are these—before the witness was sworn he professed an inability to speak English. No question was then raised on that fact by the counsel for the Crown, and accordingly the witness was sworn in Irish and gave his evidence in that language through an interpreter. After he had given his evidence in chief, he was asked, on cross-examination, whether on a recent occasion he had not spoken in English to two persons. He denied the fact, and those two persons were called as witnesses to prove that in fact he had expressed himself in English to them, and that was received as evidence to go to the jury; it was dwelt on by the judge as evidence for the jury, and it was of a character calculated to have an important bearing on their verdict. Now, with regard to the legal rules by which cases of this description are governed, I do not think it necessary to go beyond the case of the *Attorney-General v. Hitchcock*, which appears to me to place the rule of law upon a reasonable ground, so far as matters of this kind are capable of being generally stated. Some things are clear. If a witness has upon a previous occasion made an admission, or done an act contradictory of the evidence which he gives on the table in matters relevant to the issue, and if he denies that he has so said or done, you may call witnesses to contradict him. Why? Not for the purpose of discrediting him by the contradiction, but simply because the effect of the evidence adduced in con-

tradition to his, is to remove the operation of the evidence which he has given upon the facts of the case. On the other hand, it is equally clear, that as a general rule, if the antecedent matter be of a kind which if stated or done by the witness on the table on a previous occasion, would not in its nature be evidence bearing upon the issue at trial, as a general rule, you cannot call witnesses to prove it, though in so doing you will contradict something stated by the witness. If parties will cross-examine a witness as to matters of that kind, the rule is, that they are bound by the answer given, and that is a rule not confined to matter which is wholly foreign to the issue, but which equally applies to matters relating to the matter in issue, if the matter as to which the collateral inquiry be instituted, although related to the issue, be not such as would be evidence upon the trial of the issue. Such is proved by the case of the *Attorney-General v. Hitchcock*. But to that general rule an exception is said to have been established, doubtful perhaps in authority, and certainly indefinite in its application, which is of this kind, that in cases in which the antecedent statements, or acts, of a witness are calculated to show that he was under a bias as regards either party, or which, in fact, comes to the same thing, that he stood in such a position of such dominant influence of either party over him, that a bias must necessarily follow; then there is a class of cases exceptional, in which it has been held that a witness may be called to contradict the statements made by him. But why? On this ground, because that it is matter which goes to qualify or colour the whole of the evidence which he gives, and thus to affect directly the evidence on the point at issue. The whole question and difficulty in cases of this kind is to discover how far the limits may be pushed, because on that turns all the reasoning. The exception to the general rule does not go further than this, that the matter which is to be inquired into, must be of a kind to bring the witness into a special connection with the subject matter of the particular issue, or with one of the parties to that issue. Take, thus, the case of a witness who can be proved to have, over and over again, shown a habit of levity in making statements on oath, who has been frequently detected in falsehood, or, who has over and over again exhibited manifestations showing a want of religious belief; there is no doubt that all these are matters which would have an important effect with the jury, and which would affect the prospect of arriving at the truth, and yet it is settled that the cases are within the rule, and that the party questioning the witness upon such matters is bound by the answer which he receives, and cannot call other witnesses to prove the falsehood of the statement made by the witness under examination. The truth is, that the rule of exclusion is a rule of convenience, and not of principle, and if, as was put by Lord Cranworth, in the *Attorney-General v. Hitchcock*, if human life were a thing of a thousand years, then inquiries of this nature might be entered upon, but considering that such is not the case, the court must lay down a rule suited to the actual circumstances. I apprehend

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that it will be found, on looking into the class of cases referred to by my brother O'Brien, that the exceptions to the rule have not gone further than this, that the matter inquired into is of a kind which brings a witness into special connection in some way with the subject of the issue, or with one of the parties to the issue, as in the case in which proof of expressions of ill-will towards one of the parties was admitted, or the case in which the matter inquired into is whether the witness has not received a bribe from one of the parties, or the case in which the witness was living as the mistress of one of the parties. It is only in cases of the kind which brings the witness into special connection with the party, or the subject, that the rule has been broken in upon, but it has not been done in cases in which the matters relied on go only to discredit the testimony of the witness in any other case. These being the rules which, as far as authority has yet gone, are to be extracted from the cases, what was the evidence received in the present instance? The question whether this witness could or could not speak English was wholly beside and collateral to the issue which the jury had to try, which was the guilt or innocence of the prisoner. Upon what ground could evidence on this collateral subject be admissible? Not for the purpose of discrediting the witness by contradiction; it is admitted that that ground is not sufficient, but the only ground upon which it could be offered, and on which my brother O'Brien has founded it, is this, that it comes within the exception which I have adverted to, and that it is matter tending to qualify the evidence on the material points, and the argument is, that when a witness who has succeeded in getting himself examined in Irish through an interpreter, and is thus gaining the advantage which arises to him from that course,—that where a witness who has done that, is proved, on some previous occasion to have spoken English, the inference is, that he is a dishonest witness, acting under a bias, and actuated by a desire to deceive the court, and if that were a necessary inference from the fact, then there would be a strong ground for holding that this case should be added to the exceptions, though I think that it would go further than any case has yet gone, because the ground would be a general ground as available in any other case as in that on trial. But is that a necessary inference from the fact of this witness having insisted on being examined in Irish? Are fraud and a desire to deceive necessary to explain what has taken place? And this is the point on which it seems to me the argument breaks down. I apprehend it is perfectly possible that the witness was actuated by an honest motive in wishing to be examined in Irish. He may have wished to express himself in the language which he knew best, in which he could most clearly express his thoughts; and is it not easy to imagine that one of us, a person of a rank of life above that of this witness, if giving evidence in an Italian or a French court of justice, would prefer to do so in the English language?—and would we not think it very hard if witnesses were called to convict us of perjury, on the ground that we had been

using some words of French or Italian on some previous occasion ; and certainly if every lady who sings an Italian song is to be taken on that account to have a perfect knowledge of the Italian language, I can only say that a great number of ladies may very easily find themselves placed in a very unpleasant position indeed. But is it to be said, that there are no means that can be made use of to prevent the mischiefs which may possibly arise? If I am right in what I have been saying, I think I have shown that it is not a necessary consequence that the witness was actuated by a dishonest intention in requiring to be examined through an interpreter ; and if so, it appears to me that the sole ground on which this case might be made an exception to the rule, is displaced. But does it follow from that, that in no way can this matter be inquired into? I apprehend that is not so ; and I apprehend that in this case, if, when this witness came upon the table, the counsel for the Crown had said, " We can show that this man is perfectly well able to speak English," the judge might have heard evidence addressed to himself, to see the form in which this witness should be sworn. I think that course might have been adopted at that stage of the case ; but if the time be passed, and the parties wait until the evidence in chief is given before the jury, I think the evidence ought not then to be received. I do not say that even then it is too late to go into an inquiry, in the nature of an examination, upon the *voire dire*, and to hear the witnesses, not in order that the evidence shall go to the jury, but that the judge may expunge from his notes the evidence previously given. I find that in the case of *Jacobs v. Layborn* (11 M. & W. 628), Baron Rolfe uses the following language : " Does it necessarily follow that the examination on the *voire dire* is to precede the examination in chief?" And Lord Abinger expresses his approval of that suggestion of Baron Rolfe, and says he has known several instances of eminent judges, if an objection was made that ought to have been taken on the *voire dire*, erasing whole pages from their notebooks ; and, therefore, it occurs to me that that inquiry might have been gone into. Suppose the case of a witness who professes himself, when coming on the table to be a Mahometan, and is accordingly sworn on the Koran, and then his examination proceeds, and suppose that, upon cross-examination, he is asked if he has not constantly been in the habit of going to church, and has not frequently described himself as a Christian, and that he answered those questions in the negative, would evidence be admissible to contradict him? I apprehend not. It would upon the *voire dire*, to satisfy the judge as to the form of the oath. I think this was a matter which was to be decided by the judge, in the first instance, and which the jury must hold to be properly decided : and as in this case the judge decided that the proper form was to swear the witness in Irish, it does appear to me that the question asked of the witness was as entirely beside the question as evidence to go to the jury, as to ask him could he speak Greek or Latin. On these grounds, I think it would be to break in upon the general rule in

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a way which has never been done, to rule that this evidence was rightly admitted. When I consider the convenience of the case, I think it difficult to suggest a case in which the rule of convenience is more strongly applicable than the present, and cases like the present, because if it were open to the parties to go into evidence of this nature the judge must allow it, and would have no right to refuse to send it to the jury; and what would be the consequence? Why, short as my own experience has been, I venture to say, that if in every case during the last assizes in which a witness insisted on being examined in Irish, and his knowledge of English was suggested, there had been witnesses examined *pro* and *con.*, it is a matter of very serious doubt to me, whether the Spring Assizes for the province of Connaught would be over at the present moment. Upon these grounds I am of opinion that the evidence was not properly received.

KEOGH, J.—I am of opinion that the evidence was not properly received. I cheerfully adopt in their entirety, the conclusive arguments of my brother Christian. Expressed, as they have been, in the most felicitous language, I cannot risk the chance of weakening their force by adding anything to them.

GREENE, B.—I concur in the opinion that this evidence ought not to have been received. The witness before he was sworn was asked whether he could speak English. He was then ready to be sworn, and he was sworn in Irish. This inquiry whether he could speak English was merely, as it appears, for the purpose of enabling the judge to decide in what language he was to be sworn. This was entirely a matter for the judge. Well, the judge was satisfied with the statement of the witness, and allows him to be examined in Irish. Then he is examined; he is asked whether he had not, to two persons, expressed himself in English? To that question he answered in the negative: these two witnesses are produced to contradict him; and the question is whether, in point of law, such contradictory evidence should be received? It would appear that the effect of this proceeding has been to impeach the credit of the witness; this was not stated to be the object when the testimony was offered, but it appeared from the report of the learned judge. If the evidence were offered, in the first instance, professedly for the purpose of impeaching the character of the witness and showing to a jury that he was not trustworthy, it is perfectly clear that the answer he gave to the person by whom he had been produced should bind him; and he could not be permitted to impeach his own witness. The counsel for the Crown did not impeach that as a general proposition. No doubt the authorities show that if a witness deposes that he stands in a particular relation with respect to the cause or the parties in it, he may be contradicted with regard to that evidence, not for the purpose of impeaching his credit, but of showing that he had given his evidence under such an undue and improper bias as to affect the whole of it. I apprehend that none of the authorities in the book go beyond that. Let us see what the question for the judge



was, when this contradictory evidence was offered; he was to decide as a matter of law, whether this evidence was admissible or not. It was a matter for his decision, just as it is for a judge whether there has been sufficient evidence to authorise the introduction of secondary evidence. If the witness's denial were the denial of a fact of such a character that, if true, it would show his connection with the party in the cause, or that he was biased with respect to the issue in the cause, I am willing to admit that contradiction might be received. But how is the fact here? The judge calls upon him to get witnesses to contradict him upon a matter wholly beside the question, which was as to the guilt or innocence of the prisoner; and with regard to the witness himself, he may have the honest view of preventing himself from being prejudiced and embarrassed by the language which he does not understand. Now, here, what is the judge to do? Is he to say that the denial of the witness, which he has himself, shows such a bias on the part of the witness, either with respect to the subject-matter, or to the parties, as to warrant him to admit evidence to contradict? Unless he can, he is not, in my opinion, called on to receive it. This must be decided by the same rule as in the case of a kept mistress and in other cases; and, in my opinion, the judge, when called on to decide whether this should be given or not, was not in a position to say it should be done because the statement of this witness showed bias. I think, therefore, that the testimony having been received in Irish, the only possible reason was, to show that what he had sworn was untrue: now that is the very point on which the cases show me the evidence cannot be given. You must be satisfied with the answer given. And I am of opinion that if you were to lay down that the evidence here were receivable, it would entirely break down the rule as to evidence on collateral matters, and it is scarcely possible to bring forward a case in which the most irrelevant matter might not be gone into.

BALL, J.—My three brethren who have immediately preceded me have each expressed his judgment that the evidence in question should not have been received. Two of my three brethren have gone at large into the reasons that led them to that conclusion, and, if I mistake not, of all my brethren who are to follow me, the majority concur in the judgments which have been expressed by those three. My brother Keogh, following my brother Christian, felt himself unable to add to the very lucid argument of my brother Christian; my brother Greene following my brother Keogh, has expressed his reasons at large; if, accordingly, my brother Keogh felt his inability of adding anything to what was so ably said by my brother Christian, how much more do I feel unable to add to what has now been expressed, or also to add to what may be said by those who are to follow me. I entirely concur with what has been said by the three learned judges who have immediately preceded me, and, for the reasons given by them, and there is not a single sentence uttered by them in which I do not concur.

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RICHARDS, B.—I have the misfortune to differ from my brother O'Brien, but I agree with all my brethren who have preceded me, and for the reasons they have stated.

PENNEFATHER, B.—This is a question of very great importance to my mind, and, notwithstanding the difference of opinion in this court, and the respect and deference which, I unfeignedly say, I feel for the opinions of my brethren on the bench, who now compose the majority, it is one upon which I still entertain a very strong opinion. This is a matter which may be of very frequent occurrence; it is a question which affects, or may affect vitally, the administration of justice in this country, and in others. I cannot but think that there must be, in all such cases as this, some mode open to the court of investigating, as a matter of fact, the ability of a witness to speak in a language which can readily be understood by the jurors and others interested in the case; and I shall now consider whether that mode of investigation, and that examination which has taken place in the present instance, is not that which is most consonant with justice. The rules of evidence upon this point have, undoubtedly, been restricted from time to time, yet I think it cannot but be allowed that, as Lord Cranworth has said, if human life were long enough, the ends of justice might probably be better attained by a full examination into every circumstance connected with the character of the witness. However, be that as it may, public convenience, and other reasons, have conduced to the laying down of certain rules for the examination of witnesses, and for controlling what might otherwise be considered as the proper course of investigation—namely, to ascertain the truth by a full examination into everything which the witness may have said or done with reference to the case. But, while I admit that some limits must be assigned to examination, let us consider the present case, and see how far, even having regard to the admitted exceptions, it should be classed with those in which the evidence has been excluded. The cross-examination, as reported by my brother O'Brien, resolves itself into two matters—first, whether the witness had not, on two occasions previous to the trial, been in company with the prisoner; and secondly, whether the witness could speak English; one would be, at first sight, inclined to think that the question as to the ability of the witness to speak English was of much greater importance than whether he had been in the company of the prisoner, and yet, for reasons which have been stated, the first question seems to have been admitted, in the argument of this case, to have been properly put to the witness, and to be a proper subject for contradiction by the Crown, while the more important question, whether he could speak English or not, was considered inadmissible, and is now held to be so by the majority of the court. There certainly is something to be examined in reference to this matter. My brother Christian, in his very able judgment, says, that the judge having admitted the evidence of this man, and having permitted him to be sworn in Irish, the whole question was concluded,

and that the decision of the judge was final, and nothing could afterwards be admitted to contravene it. It has been suggested that an examination could have been gone into in the nature of an examination on the *voire dire*, and that thereupon not only the witness himself could have been cross-examined on the point, but that other witnesses could probably have been produced to contradict his statement of his inability to speak English. Now I may say, in the first place, that in the course of my long experience I never heard of such an inquiry (upon the *voire dire*) in a similar case. I never knew such a thing to be done. And I hold it to be completely objectionable; for those who examine a witness on the *voire dire* seek to exclude his testimony, not to discredit it; and if, in the present instance, it could be shown, after the man's denial of it, that he could speak English, still that ought not to exclude his testimony; such a duty ought not to be imposed on the judge as that of excluding the testimony of the witness altogether on such an objection as this. I cannot conceive that such a course would be legal, and if it would not, then the alternative immediately arises, that either the Crown or the public must be bound by what the witness himself will swear as to his ability to speak English, or testimony such as that adduced in the present case must be admitted. Now I conceive that the objection to the witness is not as to his competency, but as to his credit; and that it is an objection going to the entire of his evidence, inasmuch as it tends to show a bias existing in the mind of the witness favourable to the prisoner, and the possibility (I go no further) of such a bias existing, is sufficient ground for investigating the matter. To constitute a case for examining into the existence of bias, and bring the case within the class of exceptions arising out of that, it is not essential that the bias should necessarily be presumed to follow from the imputed conduct or situation of the witness. It is sufficient if the state of things be such that a presumption arises of bias probably or possibly existing in the mind of the witness. Let us try this by the test of the circumstances in the present case. Does it follow that because the witness had a conversation with the prisoner before the trial, there was necessarily a bias on his mind? and that in order to show the existence of such a bias, evidence is to be admitted to contradict the witness's denial of the fact upon which the presumption of bias so arises? In the case of the female who was living with one of the parties in a state of concubinage that intimate connection was supposed to create a bias on the mind of the witness, and possibly, in such circumstances a bias may be necessarily presumed to exist. But that, I conceive, is not the question. The question is, whether the relationship be such that the bias may naturally be supposed to exist. If the witness be a near relation to the party, it is natural to suppose the bias to exist; if he be a distant relation, the presumption is less strong, and if the connection be merely that of a casual meeting between them the presumption may be altogether displaced. Now try the case by that test. I do not say that there may not be

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many valid reasons why a witness should prefer to be examined in Irish rather than in English, for it may be the language with which he is most familiar, and in which he may think he can give his testimony with most clearness; and if that be explained to the judge he will no doubt, in the exercise of his discretion, allow the witness to be examined in Irish; taking care, however, that this shall not be made use of for the purpose of baffling cross-examination and concealing the truth. Still I say that, while on the one hand, it is too much to ask from the judge the decision of the whole question, and the rejection altogether of the evidence, it is, on the other hand, equally erroneous to hold, that if the judge admit the witness to be sworn in Irish he cannot, at a subsequent part of the trial, suffer it to be explained to what extent the witness knows the English language. Upon evidence of that knowledge I hold it is for the jury to say, whether the untruthful denial by the witness of his ability to speak English does not show a bias on his mind which may be more prejudicial to the administration of justice than that which would be presumed to arise from the nearest relationship. We find that a very slight degree of relationship between the witness and the party is sufficient to let in such evidence as this, on the ground that the relationship affords a presumption of bias; and I think that, consistently with the decided cases, and upon the principle to which I have adverted, the evidence was admissible in the present case. I hold that whether the witness denied his knowledge of English honestly, and from an inability to give his testimony clearly in that language, or whether his denial proceeded from a bias in his mind favourable to the prisoner, and from a desire to baffle the efforts of counsel in cross-examination; from whatever cause it proceeded there was a question open upon the evidence, and that testimony could be legally adduced to show what really was the motive of the witness in making the statement. I believe I may safely say there are no cases to be found bearing directly upon the point; there are no cases showing that such a course as that adopted in the present instance is illegal, and no cases where evidence precisely similar to this has been either rejected or received. With reference to the allegation that the bias must be such as would *necessarily* be presumed to arise, there is no case going to that length, nor any dictum that I am aware of. I do not think that proposition is to be found in any of the judgments of the learned judges in the *Attorney-General v. Hitchcock*. It appears to me, with every respect to those who advance it, to be a proposition which has no solid foundation; in short, so to hold, would appear to me to determine that no such evidence should be received unless it necessarily proved what can only be fully known to the witness and his God. We cannot look into the hearts and secrets of men; nor can we say that it *necessarily* follows from *any* proof of relationship that bias exists. In every case the inference is to be drawn by the jury, and if the evidence tends to establish a bias, it is for the jury to say whether the inference shall be drawn. I think upon these grounds, there

being, I will say, no decision upon the point, that the rule excluding the full examination and testing of the credit of the witness should not be extended to a case like the present, where the objection goes to the root and practice of the entire of the evidence given by the witness; for if he had the corrupt motive for denying the truth, it would of course affect the credit of everything he had said. In the absence of any decision on the point, contrary to the opinion I have maintained and notwithstanding all I have heard, I do think, with great deference to the opinions of those who differ from me, that this evidence was properly admitted.

FIGOT, C.B.—I shall now state in a condensed form what in substance were the reasons which influenced me. I am of opinion that the evidence is admissible upon three grounds, first, to contradict the witness on the subject, which was most material to the matter on which the jury had to decide. Secondly, as directly and materially tending to show the *status* of the witness in reference to the prisoner on trial, and as showing bias; and, thirdly, admissible towards frustrating a deliberate fraud of the witness in favour of the prisoner, for I collect, that when he took the oath, he affirmed that he could not speak English.

MONAHAN, C.J.—In this case, only for the accidental circumstances of my having been preceded by my brother Pennefather, and my Lord Chief Baron, I certainly would not have felt it necessary to say more, than that I agreed in the opinion and judgment of the majority of the court, so very clearly put forward by my brother Christian, but I think it is due to the very high respect I entertain for the two members of the court who have immediately preceded me, to state the grounds on which I dissent from the conclusion at which they have arrived. It must not be supposed that in this case we are considering or deciding merely the case of evidence brought forward on the part of the prisoner for the purpose of baffling as it is said the efforts of counsel in cross-examination. In this case the facts are these. A witness is produced for the purpose of being examined on the part of the prisoner; he says in Irish, "I am unable to speak English," and then, without any objection on the part of the Crown, he is sworn and examined to the facts of the case; therefore, so far as that goes, he is given nothing upon the obligation of an oath, except that what goes to the subject matter; and then he is cross-examined as to whether he cannot speak English, and whether he did not speak on the particular occasion. A great deal has been said, as to the great injury that would be done to justice, if this is not allowed to take place at some stage. I have considered this case, with all the attention in my power, and I entertain not a shadow of doubt, that there is a period and a time, a proper period, at which this inquiry may be entered into. The witness comes forward and proposes to give his evidence in Irish: can anybody question that the judge is the person to decide whether he will receive that evidence in Irish, or will compel the party to give it in English?—and though we are now called upon for the first time to decide the point, I think it is

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a matter not undeserving of our attention, that in the recollection of the members of this court, no instance has been referred to, in which such a course as that admitted in the present case has ever been admitted. We are all conversant with this on circuit, that when a witness is produced, and when he tenders himself to be examined in Irish, the counsel on the opposite side says, "This man can speak English," and he is at once examined on oath to see whether he can give his testimony in English. That is done merely for the purpose of enabling the judge to decide, not whether his evidence shall be received, but for the purpose of deciding whether Irish evidence shall be received. I am satisfied that it has occurred in my own experience, that the judge being satisfied that the witness can speak English, refuses to allow him to answer in Irish, and says, "If I find you in the progress of the examination under any difficulty, I shall allow you to be examined in Irish." But does not the very circumstance of the judge examining the person in Irish on his oath for this purpose, show that it is within the judicial province of the judge? Some time ago it was suggested, that the judge should in a case like this act on the principle that was followed in *Boyle v. Wiseman*. The point in that case arose in this way: a man came up and proposed to give secondary evidence of a written document, the other party produced a paper, the opposite counsel objected to secondary evidence being given, and said, that they were prepared by evidence to show that the document in court was the original. The judge refused to hear the evidence at that stage of the trial; but after full consideration, the Court of Exchequer decided, that before the judge received secondary evidence, he was bound to hear all the witnesses, to determine whether he would receive the document, or the secondary evidence. So I think there is no doubt, that where the question is as to the admissibility of the evidence, and it depends on extraneous facts, that the judge must take the trouble to hear all the evidence. I think it would have been quite competent for the judge to enter into that inquiry, prior to receiving the Irish evidence, and that is the time for him to decide; but it is not alleged in the present case, that it was for that purpose the present evidence was received. I do not say (if I am right in the first proposition I have laid down), that if by some oversight the counsel were not ready with that evidence, I am not prepared to say, that it was too late to tender evidence, for the purpose of allowing the evidence to be given in English. How much fairer would that have been, than to come to the conclusion that the witness is to be asked questions wholly irrelevant, the only object of which is to go to his credit, and that the judge is to tell the jury, that because he told a falsehood as to speaking English, you are not to pay any attention to what he said. It occurs to me, that it is much better to examine, if we can, previous cases, and to find out if we can, what are the principles established by those cases, and abide by these rather than introduce new rules of our own, introducing such confusion. I confess, it occurs to me, that the case of the *Attor-*

*ney-General v. Hitchcock*, lays down the proper rule, and, I think it is much better that this rule should be abided by. It is of high authority itself, and has since been alluded to by the Court of Queen's Bench. Now, in that case the question asked the witness was this: it was a prosecution for the purpose of recovering penalties from a maltster. The principal witness was asked, whether he had not stated that the officers of the Crown had offered him a sum of money to give evidence: the witness denied having said so, and counsel then proposed to call a witness to contradict him, but that evidence was rejected, and the question was, whether it was rightly rejected or not; it was decided that it was rightly rejected. The witness said, that he had never stated any such thing. It would occur to one, that the witness, stating, if it were true, that on a previous occasion some one had offered him money for giving the evidence he now was called on to give, it would naturally and properly have a serious effect on the weight the jury would give his evidence in the then present case; it would show he was a man who told a falsehood. In relation to the present trial, Alderson, B., refers to the case before Coleridge, J., in which the woman was asked whether she was not living with the plaintiff as his mistress, but Baron Alderson says, "The tendency of the question was to show that she stood in that peculiar relation to the plaintiff, which the jury ought to know, in order they might judge to what extent they could rely on the general character of the testimony, as an important witness between the plaintiff and the defendant. The question had a bearing on the general *status* of the witness, and her answer might therefore be contradicted by another witness called for that purpose. So in *Lord Stafford's case*, the evidence was receivable, as having a tendency to show that the party who came to give evidence was biased against Lord Stafford, and had endeavoured to persuade other people to give false evidence. But the fallacy is this, and the very able judgment of Pennefather proceeds upon this, that if the principle of this case is right, the evidence is only to be received when he shows a particular *status*. Upon the other hand it is not to show the *status* at all, but to show the act, which you cannot show unless it results from the bias. If evidence could be adduced to show that the witness at the instigation of the prisoner, refused to be examined in English, the evidence would be properly received, because it would be shown that he was acting under the influence of the prisoner; but here it occurs to me, that to receive the evidence, you must assume the only matter that would make it admissible, namely, to assume that the statement proceeded from a desire to favour one side or the other, instead of an inability to give evidence in English. I feel I am unable to add to what those who have preceded me have stated, but it does occur to me, that I see no reason now, why we should introduce a new practice, which I have never heard was contended for before, on either side. I do not anticipate that things will go on worse than they have before; we will not be embarrassed, for if we were to decide that this was

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legal, the rule would be applied equally as against the witnesses on the part of the Crown. I am quite aware that this is a new question, but it occurs to me to be within the principle laid down by the *Attorney-General v. Hitchcock*. I pay no attention to *Nisi Prius* cases, but a solemn deliberate judgment of a court of high character, which is afterwards adopted by another court, is of great weight, and, therefore, on the whole of this case, I am of opinion that this evidence should not have been received at the trial.

LEFROY, C. J.—It would be a presumption which I am not in general subject to the imputation of, to say I could add anything to what has been said, but I think it right to give a short summary of the reasons why I differ from my two brethren on the right and on the left. I must first disclaim totally that this case has been one in which it has been admitted either by the judges below, or by the counsel, as one in which a witness was or might be examined, to contradict the witness on the subject of his having seen the prisoner, &c.; if it was, I can only say there is a second error in the case, for I think that would be quite as objectionable as the other. Well, the present case is, no doubt, a case which is novel, so far as my experience goes, and that is a very considerable extent, with respect to Irish witnesses. Upon one occasion I remember sixteen Irish witnesses produced to prove *alibis*; upon many other occasions I have had the question very anxiously discussed, whether a witness can be compelled to give his evidence in English, or whether we must submit to his statement on oath. Upon all these occasions we have had examination, and the judge has always endeavoured to ascertain whether it was fit and proper to allow the witness to give his testimony in the Irish language, on the ground that it was not justice to him to oblige him to give his evidence on oath in a language he was not certain of; and whilst we are so very anxious for the cause of justice, are we to have no regard to what is due to the conscience of the witness? Why are we to presume that when the witness tells us he cannot give his testimony in English that he does so from a bias? Are we to preclude the witness from the opportunity of giving his evidence in the way that, on his oath, he thinks he can give it most adequately to the administration of justice? I object to all the reasons given here, that it must have been from a bias to the prisoner, as no reason whatever. It is contrary even to the rule of law that we are not to presume guilt, therefore, so far as the peculiar ground that has been rested on in analogy to what has been called the *status*, I do not think this comes within that rule, nor from the difficulty of pointing out how we are to manage when a witness tries to baffle justice. There is the old course of an examination on the *voire dire* on which the judge is to act, but which is not to be left to the jury. It is the same case as that which occurs in other instances, when the judge has to decide the point, and to decide it on his own view of the matter. I shall now proceed very shortly to give a summary of the reasons why on principle we should adhere to the general rule. I admit there have been certain exceptions



adverted to in respect of that rule, as to which my brother Christian observed, that they were exceptions, many of them of doubtful authority and all of them of very uncertain limit. It will be found better to adhere to the general rule, than to fritter it away by exceptions of the character that have been introduced. As to the status, that it was important to show that the witness was in a position calculated to make a suspicion of bias, I think it unnecessary to show that even if this case were to be considered with a view to that class of exceptions, there is no reason for admitting this under the rule applicable to the status, nor does it come within any of the other classes of exceptions. The present case unquestionably comes within the general rule, for it is to admit evidence on a collateral matter to contradict the witness; by the general rule you cannot, even to affect his credit, introduce a witness on such matter. Upon these grounds, I have come to the conclusion that in this case the evidence should not have been admitted, and that we ought to abide by the general rule. As to my brother Crampton, who has considered the case fully, I have his authority to say that he concurs in the view of the majority of the court.

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## COURT OF QUEEN'S BENCH.

*November 16, 1857.*

(Before Lord CAMPBELL, C.J., COLERIDGE and WIGHTMAN, JJ.)

REG. v. FAIRRIE. (a)

*Indictment for nuisance at common law—Offensive trade—Evidence—  
Previous summary conviction under 16 & 17 Vict. c. 128, s. 1.**Upon the trial of an indictment for a nuisance at common law, in carrying on the process of re-burning animal charcoal, in the course of a sugar refiner's business, a summary conviction under 16 & 17 Vict. c. 128, s. 1, for carrying on the same trade, so as to occasion noxious effluvia, without using the best practicable means for preventing or counteracting the smoke or other annoyance, was tendered and received in evidence.**Held, inadmissible.***I**NDICTMENT for a nuisance at common law. Plea—Not Guilty.

At the trial before Wightman, J., at the Middlesex sittings after Trinity Term, 1857, it appeared that the defendant carried on business as a sugar refiner, in Whitechapel, and that the nuisance was caused by the burning of animal charcoal in the process of refining sugar. In the course of the case for the prosecution, a conviction in March, 1855, of the defendant under the statute 16 & 17 Vict. c. 128, s. 1, was tendered, and, after objection, received in evidence. No formal conviction had been drawn up; but it was agreed that the minute made by the magistrate's clerk should be received as the conviction; and from that minute it appeared that the conviction was for carrying on the same trade, upon the same premises, so as to occasion noxious and offensive effluvia, "without using the best practicable means for preventing or counteracting such smoke, or other annoyance."

Evidence was given for the defendant, that the business could be carried on so as not to be offensive, and that since the summary conviction, an alteration in the mode of using the animal charcoal had taken place.

The verdict having passed for the Crown, a rule was afterwards obtained for a new trial on the ground of misreception of evidence.

*Byles* (Serjt.) and *Hawkins* now showed cause.—The evidence was admissible, whatever the ground of weight to be attached to it. It gave a character to the defendant's act, and could not properly be excluded (2 Phill. Evid. 354). In *Eaton v. Swansea Waterworks Company* (17 Q. B. 267; 20 L. J. 482, Q. B.) a previous conviction for disturbing a watercourse, unappealed against, was held to be admissible in evidence on a trial between the same parties. So in *Rex v. Nevill* (Peake's N. P. Cas. 125), a bond given by defendant acknowledging himself guilty of a nuisance, was held admissible on the trial of an indictment for a nuisance, in carrying on the same business in another place.

*Bovill* (*Honeyman* with him) in support of the rule.—The conviction being for a less penalty than 3*l.* the defendant could not have appealed against it. Besides the offence of which the defendant was convicted was not the same as that charged in this indictment. (They were then stopped by the Court).

LORD CAMPBELL, C.J.—I think the rule for a new trial must be made absolute. If this conviction had been in the very same terms with the present indictment, I should have felt very great doubt as to its admissibility; but it is decisive against its admissibility, that it is not a conviction for the same offence as that charged in the indictment. The defendant may have been guilty of an offence against the Smoke Nuisance Abatement Act, 16 & 17 Vict. c. 128, but that conviction is not evidence that they have been guilty of a common law nuisance. The case of *Eaton v. Swansea Waterworks Company* is not at all in point, because in that case the conviction was used, merely for the purpose of showing an interruption to the right which the plaintiff claimed. The case of *Rex v. Nevill*, is much nearer the present, but with every respect for the judgment of Lord Kenyon, I cannot concur in what he is there reported to have said: "That the defendant having acknowledged himself guilty of a nuisance in another place, cannot object to this evidence, which will weigh more or less against him, as it shall appear this place is more or less like that where he before resided." It appears to me quite contrary to principle, to hold that a bond given by the defendant, acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for a nuisance in carrying on the same business in another place. And the admission of such evidence would lead to most inconvenient results, because it would render it necessary to go into evidence on the one side and on the other, to ascertain whether the business was carried on in the same manner. I think the conviction here ought to have been rejected, and that there must be a new trial.

COLERIDGE, J.—The issue was, whether the defendant at the time mentioned, carried on his business in such a manner, as to be a nuisance at common law. And the prosecutor gave in evidence a conviction, which my brother Byles said amounted to an admis-

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sion that the trade of the defendant was a nuisance. If it was admissible at all, it could only amount to an admission that in 1855 the defendant was convicted of an offence under the 16 & 17 Vict. c. 128. Looking at the words of the stat. 16 & 17 Vict. c. 128, it clearly was not intended for the purpose of putting down common law nuisances; and the offence charged in the information, does not necessarily involve any common law nuisance. Then, having reference to the mode of trial, and also to the positive injustice which may be done by receiving such evidence, I think it is inadmissible. First, it tends to raise collateral issues, upon which, if justice is to be done, evidence must be gone into on both sides; and, secondly, as to the injustice to the accused, how is it to be supposed that he can be prepared to meet evidence of this description? He would have no means of knowing that a former conviction, under an Act of Parliament passed with a different object, would be used by the prosecution against him.

WIGHTMAN, J.—The great question at the trial was, whether the process itself of burning animal charcoal was a nuisance; and the evidence on both sides went to a period anterior to the summary conviction. I should have doubted, certainly, whether that was evidence, if the charges had been precisely the same; but I was very much struck with the remark that in truth the conviction is not *ad idem* with the indictment, and that a person might be guilty under the act, without incurring a liability to an indictment for a common law nuisance. Therefore, on this ground alone, I think the rule should be made absolute for a new trial.

*Rule absolute.*

## COURT OF QUEEN'S BENCH.

*November 21, 1857.*

(Before Lord CAMPBELL, C.J., COLERIDGE and WIGHTMAN, JJ.)

REG. v. STAPYLTON AND OTHERS. (a)

REG. v. ESDAILE AND OTHERS.

REG. v. BROWN AND OTHERS.

*Conspiracy—Practice—Particulars of acts relied on—Overt acts.*

*On a general count for conspiracy, the defendant is entitled to particulars of the acts relied upon in support of the charge; but on a special count alleging overt acts, the court will not order particulars to be furnished, in the absence of an affidavit on the part of the defendant, that he has no knowledge of the overt acts charged, and does not possess sufficient information to enable him to meet them.*

*Quære, whether with such an affidavit, the defendant would be entitled to particulars.*

**C**RIMINAL informations, filed *ex officio* by the Attorney-General, against certain directors and other persons connected with the Royal British Bank, for conspiracy to defraud.

There were three informations, and the indictment in each case consisted of twelve counts, six being specific and alleging overt acts of conspiracy, followed respectively by general counts (second, fourth, sixth, eighth, tenth, and twelfth). All the general counts were afterwards struck out, except number twelve, by consent of the Crown.

*First count* charged that the defendants conspired to publish and represent to such of the shareholders of the Royal British Bank as were ignorant of the true state of the affairs of the bank, that the bank and its affairs had been, during the half-year ended June 30, 1855, and then were, in a sound and prosperous condition, producing profits, divisible, &c., they well knowing the contrary, &c., with intent to deceive and defraud such of the shareholders as were not or might not be aware of the true state of its affairs, and to induce them to continue to hold shares therein, and to pur-

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law,

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chase and take other shares therein, and to become or continue customers and creditors of the said bank in the way of its trade.

The count then set out the following overt acts :

*First overt act.*—Publishing a report to the 30th of June, 1855, declaring a dividend six per cent.

*Second overt act.*—Issuing new shares, knowing the bank to be in an embarrassed and failing condition.

*Third overt act.*—Publishing to the shareholders a balance sheet for the half-year, false in the amount of assets, the provision for bad debts, and the balance, as they well knew.

*Fourth overt act.*—Paying a dividend of six per cent., knowing that it was not earned.

*Fifth overt act.*—Buying shares in the bank, and paying for them with the bank money, with intent to keep up the price of shares.

*Sixth overt act.*—Issuing a circular of the 10th of September, 1855, as to an intention to open branch premises in Holborn, and stating a resolution of the directors to issue 2,000 further new shares, they well knowing that the bank was in a losing and failing condition.

*The third count* charged a conspiracy to defraud the customers and creditors of the bank ; alleging overt acts similar to those in the first count.

*The fifth count* charged a conspiracy to defraud the Queen's subjects generally, alleging the same overt acts as in the first count.

*The seventh count* charged a conspiracy to cheat and defraud such of the shareholders, as were ignorant of the true state of the bank, by inducing them by false pretences to purchase and hold additional shares in the bank, the defendants knowing the bank to be in a bad and dangerous condition and approaching insolvency, and that the shares were unsafe, and might be ruinous to the holders ; alleging overt acts the same as numbers one to five in the first count.

*The ninth count* charged a similar conspiracy to defraud the Queen's subjects generally ; alleging overt acts same as the fourth, fifth, and sixth in the first count.

*The eleventh count* charged a general conspiracy to cheat and defraud John Arundel and other persons named.

Rules *nisi*, having been obtained on behalf of the several defendants, for particulars of the offences to be charged under several of the counts, and also of the overt acts in the special counts,

*Sir F. Thesiger*, *Ballantine* (Serjt.), *Welsby* and *J. Brown*, showed cause on behalf of the Attorney-General.—Since *Rex v. Gill* (2 B. & Ald. 204), which decided that a general count for conspiracy was good without alleging any overt acts, a practice has grown up of granting particulars in such a case, and in this case, upon the general count (number twelve), *Crompton, J.*, at chambers, made an order for particulars, refusing to extend it to the other counts. It is difficult to learn from the cases the extent of the right of the defendants to particulars in cases of conspiracy.

A defendant can only be entitled to be informed of the nature of the conspiracy charged, and not of the specific acts by which it is to be proved in evidence. Here the defendants are asking for what is not requisite for the purpose of their defence, as the overt acts give them all the necessary information which they are entitled to, and show sufficiently the particular charges of conspiracy intended to be established against them. They have no right to know the means of proof, or what evidence is going to be offered against them. The rule is laid down in *Rex v. Hamilton* (7 Car. & P. 448), "If the counts are general, the prosecutor must furnish a particular, giving the same information to the defendant as a special count would; but the Court will not order a particular of the specific acts of the conspiracy, or the times and places at which those acts occurred." Where the act itself, which is the object of the conspiracy, is illegal, nothing need be stated about the means agreed upon or pursued to effect it: (*Eccles's case*, 1 Leach, 274). [COLERIDGE, J., referred to *Rex v. Curwood* (5 Nev. & Man. 369; 3 A. & E. 815), where on an indictment charging various nuisances, created by the produce of certain gas-works, corrupting the waters of the Thames, and destroying the fish, and rendering the air unwholesome, the Court ordered the prosecutor to give a note of the several acts of nuisance, which he intended to prove.] There the indictment was not so specific as here. [COLERIDGE, J.—Here in one set of counts you state particular acts, in the other the language is quite general. Surely the intention of the second set of counts must be assumed to include something not in the first set. WIGHTMAN, J.—Besides, you are not confined to the overt acts alleged, but may prove other acts.] The cases of *R. v. Kenrick* (5 Q. B. 49), and *R. v. Hodgson* (3 C. & P. 422), were then referred to.

The Court having intimated an opinion that particulars ought to be given under the general counts,

*Sir F. Thesiger* undertook that all those counts should be struck out, and that in case the Crown proposed to prove any other overt acts than those alleged, particulars of them should be given to the defendants.

The Court expressed their opinion that the defendants ought to be satisfied with this; but,

*Sir F. Kelly, Bovill, Coleridge*, and *D. Seymour*, on behalf of the defendants.—The defendants have a right to know what the overt acts were, and how they were to be proved; so that they might at the trial be prepared to meet the charge. One of the overt acts alleged was a false balance-sheet, but the particulars in which it was false were not set out.

Lord CAMPBELL, C. J.—I am of opinion that no further particulars ought to be given beyond those, which, on the part of the Attorney-General, it has been agreed shall be given.

COLERIDGE, J.—I am of the same opinion. I have come to this conclusion after some considerable doubt, and on this ground only, that there is no affidavit that the defendants do not possess

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the knowledge which they are seeking for by this rule. As to the false balance-sheet, and the purchase of shares, and the false assets, these are all alleged as overt acts, but without particulars. I think no particulars ought to be given with regard to these cases, which are charged in accounts rendered by the defendants themselves. The general principle applies only to this extent, to give such information as is sufficient to enable the defendant fairly to defend himself when in court; but, on the other hand, not to fetter the prosecutor in the conduct of his case. These principles must govern this case, in the absence of any affidavit stating that the defendants have no knowledge of the particulars, either from the magnitude of the subject, or from their taking so little part in the management of the bank.

WIGHTMAN, J.—I am of the same opinion. I also think that as there is no affidavit on the part of the defendants, of want of knowledge as to the particulars sought to be obtained, the rule ought not to be made absolute. The accounts were furnished by the defendants themselves, and although it is said that they are very voluminous, and that the defendants had no knowledge of the particular items, yet it may be inferred from what has passed already, that enough has occurred to give them all the knowledge they are now seeking to obtain. It is true that in charges of embezzlement particulars are given, but there is an affidavit of the party charged that he is wholly ignorant of what the charges consist. I do not say what my opinion would be, if there had been such an affidavit in this case.

*Rule discharged as to that part seeking for  
particulars of the overt acts.*



## NORTHERN CIRCUIT.

## YORK SPRING ASSIZES.

*March 6, 1858.*

(Before BYLES, J.)

REG. v. WILLIAM LEVY AND ANOTHER. (a)

*Previous conviction—18 & 19 Vict. c. 126—Evidence.*

*It is sufficient evidence of a previous summary conviction, to show that the certificate of conviction and the warrant agree, and that the prisoner was received into custody under the warrant, without further proving identity.*

THE prisoners were indicted for robbery at Leeds. The jury found a verdict of guilty, and the indictment also charging that Levy had been previously convicted of felony, the court proceeded to try that charge.

It appeared that a person named William Levy had been summarily convicted at Leeds, under the provisions of the stat. 18 & 19 Vict. c. 126, and that no witness could be produced who was present when that person was convicted.

H. West (*Alfred Austin* with him), for the prosecution, proposed to prove the identity of the prisoner with the person so convicted, by putting in the conviction before the magistrates of the borough of Leeds, under the provisions of the act, 7 & 8 Geo. 4, c. 28, s. 11 (b), which he said were not affected by the 14 & 15 Vict. c. 99, s. 13 (c), [BYLES, J.—That is so.] and by calling the

(a) Reported by R. M. D. LITTLE, Esq., Barrister-at-Law.

(b) "A certificate, containing the substance and effect only of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer, having the custody of the records of the court where such offender was first convicted, or by the deposition of such clerk or officer, shall, with proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person signing the same."

(c) "Whenever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of any such person or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deposition of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof."

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Governor of the Leeds Borough Gaol, who produced a warrant of commitment signed by the same magistrates, and otherwise agreeing in every particular with the conviction, under which warrant he stated that he received the prisoner who had just been convicted into his custody, and that he underwent his sentence in pursuance of the terms of the warrant. *West* also mentioned the case of *Reg. v. Crofts* (9 C. & P. 219).

BYLES, J.—That is evidence on which the jury may fairly convict the prisoner of having committed this robbery, after having been previously convicted of felony. *Verdict, Guilty.*

## COURT OF CRIMINAL APPEAL.

November 13, 1858.

(Before COCKBURN, C.J., WIGHTMAN, WILLIAMS, WILLES, JJ.,  
and CHANNELL, B.)

REG. v. WM. BENNETT. (a)

*Manslaughter—Explosion of fireworks—Negligence—Servant.*

*The prisoner had for years been accustomed to keep fireworks in a house in London for sale, and a part of the process of manufacture of some of them was performed in the house, and by the supposed negligence of one of his servants an ignition of red and blue fire was caused, which communicated to the other fireworks, and a rocket shot across the street and set a house on the opposite side on fire, by which the death of S. W. was caused.*

*Held, that the prisoner was not liable to be indicted for manslaughter, as the unlawful act of keeping the fireworks was disconnected with the supposed negligence of the servant, which was the proximate cause of the death.*

THE following case was reserved by Willes, J. :—

William Bennett was convicted before me at the Old Bailey Sessions, on the 18th August, 1858, of the manslaughter of Sarah Williams.

The substantial question is, whether a person who makes fireworks contrary to the 9 & 10 Will 3, c. 7, s. 1, is indictable for manslaughter, if death be caused by a fire breaking out amongst

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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combustibles in his possession, collected by him, and in the course of use for the purpose of his business, but not completely made into fireworks at the time.

The prisoner had a house and firework shop in the Westminster-road, where, for some time before the fire hereinafter mentioned, he openly carried on the business of selling fireworks. He had also a workshop at a neighbour's named Sunter, and a factory at Peckham. He had contracts to supply Cremorne and Vauxhall-gardens with fireworks, which he regularly did in considerable quantities.

He made and kept his stock of fireworks at the factory at Peckham. From thence he used to take the supply necessary for the Gardens, daily, to the house in the Westminster-road, where they used to be kept for two or three hours, until they were taken away for use at the Gardens. In the room at Sunter's the smaller sort of rockets were made, excepting the heads for holding stars. These heads were added at the house in the Westminster-road. At the house in the Westminster-road fireworks were offered for sale. No fireworks were made there, except as follows:—First, the finishing the smaller rockets, as already mentioned, and making stars for them of combustible matter; secondly, making fireworks called serpents; thirdly, making cases, and filling them with combustible matter, called "red, blue and green fire." It is to this last-mentioned part of the business that I ought particularly to direct attention. The fire was employed for filling coloured cases used to imitate revolving lights in fireworks called "wheels." These cases were not used by themselves, but in connection with those fireworks, to add to their effect. The contents of the cases of fire made at the Westminster-road were combustible, and the red fire would explode if struck hard. Five or six pounds of fire, were made every day in the house in the Westminster-road, and filled there, in the back room, into cases with a rammer and mallet, by a person employed for the purpose.

At the time of the fire there was a quantity of the red and blue fire in the house, in the room where it was to be put into the cases, in order to be used as already mentioned in the course of the business, and a quantity of fireworks for the evening.

On Monday the 12th July, about six in the evening, the prisoner being out of the house, and not personally interfering, a fire broke out in the red and blue fire, which communicated to the fireworks, causing a rocket to fly across the street, and set fire to a house at the opposite side, in which the deceased Sarah Williams was burnt to death. The fire was accidental in the sense of not being wilful or designed. It did not happen through any personal interference or negligence of the prisoner, and he is entitled to the benefit of any distinction between its happening through the negligence of his servants, or by pure accident without any such negligence.

It was contended that there was no case against the prisoner, inasmuch as the cases of the red, &c., fire, were only parts of fire-

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works, and not within the statute, and that it did not appear that it was by reason of making fireworks the accident happened; and that at all events the death was not the direct and immediate result of any wrong or omission on the prisoner's part; and there was cited a case from the Sessions Reports at the Old Bailey, in which Alderson, B. is reported to have held, that an indictment for manslaughter was not maintainable under such circumstances. I, however, overruled these objections, holding that the prisoner was guilty of a misdemeanour in doing an act with intent to do what was forbidden by the statute; and that as the fire was occasioned by such misdemeanour, and without it would not have taken place, or could not have been of such a character as to cause the death of the deceased, which otherwise would not have taken place, a case was made out.

The question of a nuisance independent of the statute of Will. 3, and the considerations arising upon it, need not be noticed, as it has been disposed of upon the facts in favour of the prisoner.

Entertaining doubts upon the above points, I request the opinion of the judges.

The prisoner is out on bail.

*Giffard* appeared for the defendant, but was not called upon to argue.

*Martin* for the prosecution.—The explosive nature of the substances is to be considered, and the prisoner is responsible for the illegal act in keeping them in such a public place.

COCKBURN, C. J.—I am of opinion that the conviction was wrong. The prisoner kept a quantity of fireworks in his house, but that alone was not the cause of the death, but by the negligence of some one of his servants the fireworks ignited, and the house in which the deceased was, was set on fire and death ensued. So that the keeping of the fireworks in the house caused the death only by the superaddition of the negligence of some one else. The keeping of the fireworks may be a nuisance, and if from that unlawful proceeding the death had ensued as a necessary and immediate consequence, the conviction might be upheld. But the keeping of the fireworks did not alone cause the death, but that act of the defendant, *plus* the act of somebody else, did. The defendant was not liable therefore.

WILLES, J.—I am of the same opinion. Since the trial I have thought over the case very much, and as the fire which caused the death did not happen through any personal interference or negligence of the prisoner, the prisoner ought to have the benefit of that; and as the parish officers did not indict him for the nuisance of keeping a quantity of fireworks in his house, but allowed him to go on doing so for years, and as that act of the defendant's, the keeping of the fireworks in the house, was disconnected with the negligence of his servant which caused the fire, my impression is very strong that the conviction cannot be legally sustained.

WIGHTMAN and WILLIAMS, JJ. and CHANNELL, B. concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

November 13, 1858.

(Before COCKBURN, C.J., WIGHTMAN, WILLIAMS, and WILLES,  
JJ., and CHANNELL, B.)

REG. v. WILLIAM BUTCHER. (a)

*Indictment—False pretences—Proof—Variance.*

*An indictment for obtaining money by false pretences, in the first count alleged that prisoner pretended to H. that he was the agent of J. B., and was sent to the pay-table, to receive certain moneys payable to J. B., and that he was authorised to receive such moneys on behalf of J. B., by means whereof, &c.*

*In a second count the false pretence was alleged to be, that the prisoner falsely pretended to one A. that he (the prisoner) was authorised to send him (A.) to the pay-table, to get the pay-table money of the aforesaid J. B., by means of which, &c., the prisoner obtained from H. certain money, with intent to defraud.*

*In a third count the false pretence was alleged to be, that the prisoner pretended to the said A., that he (prisoner) was the agent of J. B., and that he (the prisoner) was sent by J. B. to the pay-table, to receive certain moneys payable to J. B., and that he was authorised to receive such moneys on behalf of J. B., by means of which, &c., the prisoner obtained from A. certain moneys, with intent to defraud.*

*At the trial, A. proved that the prisoner sent him to the pay-table in these terms, "Go to the pay-table, and fetch J. B.'s money;" that he (A.) accordingly went, and said to H., "He wanted J. B.'s pay-table money;" whereupon H., without asking any question, gave the money due to J. B. to A., who took it to the prisoner:*

*Held, that this amounted to a false pretence by the prisoner "that A. was authorised to receive J. B.'s money," but was not evidence of the pretences charged in the indictment, that he, the prisoner, was authorised, &c., to receive J. B.'s money.*

**T**HE following case was reserved, and stated by the chairman of the Kent Sessions.

At the general quarter sessions of the peace for the county of Kent, held at St. Agustines, near Canterbury, on the 6th April, 1858, William Butcher was tried upon the following indictment:—

*Kent, to wit.*—The jurors for our lady the Queen on their oath

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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present that William Butcher, on the 22nd day of January, in the year of our Lord 1858, unlawfully, knowingly and designedly did falsely pretend to one James Holden, the treasurer and servant of a certain incorporated company, called the Company of Free Fishers and Dredgers of Whitstable, in the said county, that he the said William Butcher was the agent of two persons, named James Butcher the elder and James Butcher the younger, of Whitstable aforesaid, which two persons were commonly known by the name of the "Jim Butchers;" and that he the said William Butcher was then sent by the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," to the pay-table of the Company of Free Fishers and Dredgers of Whitstable aforesaid, to receive certain moneys then payable by the said company to the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," and that he was then authorised to receive such moneys for and on behalf of the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers;" by means of which said false pretence, the said William Butcher did then unlawfully obtain from the said James Holden the sum of 2*l.* 3*s.*, of the moneys of the said company, with intent thereby then to defraud; whereas, in truth and in fact, the said William Butcher was not then the agent of the said James Butcher the elder and James Butcher the younger, or either of them, and was not then or at any other time sent by the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," or either of them, to the pay-table of the Company of Free Fishers and Dredgers of Whitstable aforesaid, to receive certain moneys or any money payable by the said company to the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," or to either of them; and the said William Butcher was not then authorised to receive such moneys or any money for and on behalf of the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," or either of them, as he the said William Butcher well knew, against the form of the statute in such case made and provided.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that William Butcher, on the 22nd day of January, in the year of our Lord 1858, unlawfully, knowingly and designedly did falsely pretend to one William Butler, that he the said William Butcher was authorised to send him the said William Butler to the pay-table of the said Company of Free Fishers and Dredgers of Whitstable, to get the pay-table money of the aforesaid James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers;" by means of which said false pretence, the said William Butcher did then unlawfully obtain from the said James Holden, then being the treasurer of the Company of Free Fishers and Dredgers of Whitstable as aforesaid, and from the said William Butler, the sum of 2*l.* 3*s.* of the moneys of the said company, with intent thereby then to defraud; whereas, in

truth and in fact, the said William Butcher was not then, or at any other time, authorised to send the said William Butler to the said pay-table of the said Company of Free Fishers and Dredgers of Whitstable to get the pay-table money or any other money of the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," as he the said William Butcher at the time he so falsely pretended well knew, against the form of the statute in such case made and provided.

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*Third count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that on the 22nd day of January, in the year of our Lord 1858, the said William Butcher knowingly did falsely pretend to the said William Butler, that he the said William Butcher was the agent of the said James Butcher the elder and the said James Butcher the younger, commonly known by the name of "the Jim Butchers," and that he the said William Butcher was then sent by the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," to the pay-table of the company aforesaid, to receive certain moneys then payable by the said company to the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," and that he was then authorised to receive such moneys for and on behalf of said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers;" by means of which false pretence the said William Butcher did then unlawfully obtain from the said William Butler the sum of 2*l.* 3*s.* of the moneys of the said William Butler, with intent to defraud; whereas, in truth and in fact, the said William Butcher was not the agent of the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," or either of them; and whereas, in truth and in fact, the said William Butcher was not then, or at any other time, sent by the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," or either of them, to the pay-table of the said company, to receive certain moneys then payable by the said company to the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," or any money whatsoever; and whereas, in truth and in fact, he was not then authorised to receive such moneys, or any money whatsoever, for or on behalf of the said James Butcher the elder and James Butcher the younger, otherwise "the two Jim Butchers," as he the said William Butcher well knew, against the form of the statute in such case made and provided.

There was another count in the indictment, which was abandoned at the trial by the counsel for the prosecution.

The substance of the evidence for the prosecution was as follows:—John Hammond Nicholls stated that he was foreman of the Incorporated Company of Free Fishers and Dredgers of Whitstable; that the affairs of the company are managed by the foreman and jury, and by a treasurer; that the members of the company are called freemen, and are employed under the supervision of the foreman in working upon the oyster grounds of the company, and

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are paid for their work by the treasurer, and that the treasurer of the company is James Holden, and that the witness and James Holden met at a public-house in Whitstable-street, called the Duke of Cumberland, on Friday, the 22nd January, 1858, at the pay-table, for the purpose of paying the freemen for their work; that the defendant William Butcher is a freeman of the company, and was then entitled to receive, and came to the pay-table and did receive, his pay of 14*s.* between five and six o'clock in the evening of the said 22nd January; that amongst the freemen of the said company are two persons, father and son, of the name of James Butcher, who go by the name of "the two Jim Butchers," and the money which becomes due to them is commonly called "the two Jim Butchers' money;" that between six and seven o'clock of the same Friday evening, a little boy came to the pay-table after the defendant William Butcher had received his money, and said, "I want the two Jim Butchers' money;" that the sum of 2*l.* 3*s.* was due to the two James Butchers; that witness told Holden the treasurer to pay the 2*l.* 3*s.*, and witness saw Holden pay the money to the boy; that the freemen frequently send their boys and girls for their money; that afterwards James Butcher the father came, and then James Butcher the son came, for their money.

William Butler, a boy ten years of age, stated that he knew the defendant William Butcher; that he the witness and another boy were playing together in the street of Whitstable, on Friday the 22nd January last, near the Duke of Cumberland public-house; that the defendant came to them and said, "Which of you boys wants to earn a penny;" that witness replied "I do;" that the defendant then said to witness, "Go to the pay-table, and fetch the two Jim Butchers' money;" that witness accordingly went to the pay-table at the Duke of Cumberland public-house, where Mr. Nicholls and Mr. Holden were, and asked for "the two Jim Butchers' pay-table money;" that he received 2*l.* 3*s.* and went back to the street where defendant was waiting, and gave him the money, and received from him a penny.

On cross-examination witness said he went and received the money, and afterwards gave it to the defendant, because he had promised him the penny for so doing.

James Holden stated that he was treasurer of the company; that on Friday the 22nd January he was at the pay-table with John Hammond Nicholls, the foreman of the company; that a little boy, the witness last examined, came and asked for "the two Jim Butchers' pay-table money;" that he paid 2*l.* 3*s.* to the boy; that the money so paid to the boy was the money of the company; that he parted with the money because the boy came and said he wanted "the two Jim Butchers' money," and that he should not have parted with it without; that Nicholls, the foreman, goes on the oyster-grounds, knows what work has been done by the freemen, and what each has earned and is to receive; that Nicholls specified the amount, and told him what he was to pay; and that he should not have parted with the money if the little boy had not



said he was sent for it, and if he had not believed that the boy was authorised by the two Jim Butchers to receive it.

The defendant's name was never mentioned in the transaction.

James Butcher the father, and James Butcher the son, respectively, proved that they were commonly known as "the two Jim Butchers;" that they did not authorise either the defendant William Butcher, or the boy William Butler, to receive their money from the company, and did not send any one for it on the said Friday evening.

It did not appear that either the foreman or the treasurer of the company knew the name of the little boy, or who he was, at the time the treasurer paid him the money.

On the part of the defendant it was contended that the defendant was entitled to be acquitted on the following grounds:—First, because the conduct of the defendant did not amount to the making of any false pretence at all. And, secondly, as to the false pretences alleged in the first and second counts in the indictment, that they were not substantiated by the evidence, inasmuch as, even if the evidence was to the effect that the defendant pretended to the boy Butler that he, the defendant, was authorised to receive "the two Jim Butchers' money, such pretence was not the false pretence communicated to Holden and by means of which the money was obtained, but that the impression on the mind of Holden, made by the application of Butler, was, according to Holden's evidence, "that Butler had been authorised by the said 'Jim Butchers' to receive their money," being a pretence essentially different from that laid in the first and second counts. With respect to the second count in the indictment, it was also submitted that the money when obtained from Butler, was not in his hands as the agent of the company, the property in it having been parted with by the treasurer when paid to him; and it could not therefore be held that the money obtained from Butler was the property of the company, as laid in this count, and that therefore it was not proved that the prisoner obtained from James Holden and from William Butler any moneys the property of the company.

In addition to this, it was contended, that the second count charged an obtaining from James Holden and William Butler jointly, and that such obtaining was disproved by the evidence.

With respect both to the second and fourth counts, it was urged that the evidence showed that the money was not obtained from the boy by any false pretence at all, but by the promise of the penny. And with respect to the fourth count, it was urged in addition that the moneys there mentioned to have been obtained were not, as against the prisoner, the property of William Butler.

On the part of the prosecution, it was contended that the boy Butler was the innocent agent of the defendant; that the false pretence made through the medium of the boy was the act of the defendant; that the boy was the mere mouthpiece of the defendant; that what the boy said was, in point of law, said by the defendant himself; just the same as if he had been personally present in the

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room saying what the boy said; and that the evidence supported the first, and also the second and fourth counts of the indictment.

I stated to the jury that, if they were of opinion that the defendant was guilty of obtaining money by false pretences upon the facts proved, the question of law would be reserved for the decision of the Court of Criminal Appeal.

The jury found the defendant guilty.

The judgment was respited, and the defendant was admitted to bail to appear and receive sentence at the next Court of Quarter Sessions.

The question for the Court of Criminal Appeal is, whether the facts proved are sufficient to support either the first, second, or fourth counts of the indictment.

JAMES B. WILDMAN, Chairman.

No counsel appeared for the prisoner.

*Addison (G. Francis with him)* in support of the prosecution.—The boy Butler presented himself at the pay-table and said, "I want the Jim Butchers' money." That must necessarily convey the idea, that he meant that he was authorised to ask for and receive their money. It is not necessary that words should be used, as where a person at Oxford, not a member of the University, went to a shop for the purpose of fraud, wearing a commoner's gown and cap and obtained goods; this was held a sufficient false pretence within the statute, though nothing passed in words: (*Rex v. Barnard*, 7 C. & P. 784.) The substance of the pretence here is, that he, the prisoner, was authorised to receive the Jim Butchers' money. [WIGHTMAN, J.—All that the boy said was, "I want the Jim Butchers' money." Does not that imply a representation that he had authority to ask for their money? [WILLIAMS, J.—It is like the case of presenting a post-office order. WIGHTMAN, J.—By a false pretence, the prisoner made the boy go for the money. Is there a count alleging that the boy represented that he had authority to receive the money?] No; but it is submitted that the count was proved, which alleges that he was guilty of obtaining the money from the boy by false pretences. A party who has concurred and assisted in obtaining money by false pretences may be convicted as principal, though not present at the time of making the pretence and obtaining the money: (*Reg. v. Moland*, 2 Mood. C. C. 276.) [COCKBURN, C.J.—A party is responsible for an act done through the instrumentality of his agent, and we may view the case in the same light as if the prisoner had taken the boy to the pay-table, and said, "This boy has come to receive the Jim Butchers' pay-table money." But then there is no count to meet such a pretence. WILLES, J.—The pretence that gets the money is that the boy was entitled to receive the money, which implies an authority from the Jim Butchers to the boy.] The fourth count meets the case: (*American cases cited, The Commonwealth v. Harley*, 7 Metcalfe, 462; *The Commonwealth v. Call*, 21 Pickering, 523.) [COCKBURN, C.J.—Here one person goes to another

and says to him, "Go and represent that you are entitled to receive the Jim Butchers' money;" but that is not the pretence laid in the indictment. WIGHTMAN, J.—The indictment only charges a false pretence that the prisoner was authorised to receive the money.]

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COCKBURN, C.J.—I am of opinion that this conviction must be quashed. The case does not appear to me to present any difficulty. I quite agree that the prisoner has been guilty of obtaining money by false pretences; but the pretence on which the money was obtained is not included among those in the counts of this indictment. It is laid in the indictment to have been represented by the prisoner that he was authorised to receive the money of the Jim Butchers; but that is not the false pretence by which the money was obtained. No doubt the prisoner is responsible for the representations of his immediate agent; but that does not get over the rule of pleading, that you must truly allege the false pretence by which the money was obtained. According to the evidence, the prisoner told the boy, "to go to the pay-table and fetch the two Jim Butchers' money," and the boy went and "asked for the two Jim Butchers' pay-table money," and he got the money. Now, although that must be taken necessarily to imply that he represented that he had authority to receive "the two Jim Butchers' money," and although I am of opinion that the prisoner is responsible for what he makes the boy say, still the indictment is not proved, for it makes the boy say a different thing. There was no such representation made by the boy as those charged in the indictment, and the treasurer of the company did not part with the money on the representations laid. It is unfortunate that there is no count in the indictment which hits the facts.

WIGHTMAN, J.—I am of the same opinion. The law has been correctly stated by Mr. Addison, but on the ground pointed out by the Chief Justice, I agree that, whatever may be the case on the merits, this indictment does not hit the case.

WILLIAMS, J.—I am of the same opinion. There was quite sufficient evidence to support a conviction on the ground that the prisoner was guilty of the false pretence by which the money was obtained from the prosecutors, but that was that the boy Butler was sent for "the Jim Butchers' money," but there was no count in the indictment for that, which was really the false pretence by which the money was obtained. At one part of the argument I thought the conviction might be supported on the principle in *Reg. v. Brown*, 2 Cox Crim. Cas. 348, where it was said by Patteson, J. "that the pretence need not be made to the same person as the money is obtained from; and where it is said "that by means of the false pretences" the money was obtained, that is a question of evidence, and that if there are any means to show that the pretence to A. operated on the mind of B., it must be shown in evidence." On reflection, however, I think that the false pretence by which the money was obtained is not truly stated, for the false pretence

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*False pretences.* he made to the boy was, that he, the boy, was sent for the "Jim Butchers' money."  
 WILLES, J. concurred.  
 CHANNELL, B.—I also think that there is no count in the indictment to meet the case.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

November 20, 1858.

(Before POLLOCK, C.B., WIGHTMAN, WILLIAMS, BYLES, and HILL, JJ.)

REG. v. AARON LYONS. (a)

*Arson—Setting fire to goods in a house to defraud an insurance company—Felony—14 & 15 Vict. c. 19, s. 8—7 Will. 4 & 1 Vict. c. 89, s. 3.*

*The prisoner wilfully set fire to goods, consisting of furniture and stock-in-trade, being in a house in his own occupation, with intent to defraud an insurance company. The house was not set on fire, or burnt : Held, that he was guilty of a felony under the 14 & 15 Vict. c. 19, s. 8 ; and that an indictment charging him with feloniously, &c., setting fire to certain goods of his, to wit, &c., being in a certain house, in the possession and occupation of the prisoner, with intent, &c., was sufficient.*

CASE reserved by Byles, J.

The prisoner was indicted at the last Summer Assizes for the county of Salop, for setting fire, in a house in his own occupation, to his own goods, consisting of furniture and stock-in-trade, with intent to defraud an insurance office.

The goods, according to the evidence, had been insured against fire, and were in the prisoner's own house, no part of which house was burnt.

It was objected that the setting fire to the prisoner's own goods, in his own house, though with intent to defraud the insurance office by burning the goods, was not felony at common law ; that the prisoner could only be convicted, if at all, under the 14 & 15 Vict. c. 19, s. 8, which enacts, that if any person shall maliciously

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

set fire to any goods being in a building, the setting fire to which building is made felony by statute, he shall be guilty of felony; that the setting fire to a man's own house being no offence at common law, the only statute which makes it a felony is the 7 Will. 4 & 1 Vict. c. 89, s. 3, whereby it is enacted "that whosoever shall maliciously set fire to any house, &c., whether the same shall be in the possession of the offender or of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony;" that the setting fire to a man's own house with intent to defraud, not by burning the house, but by burning the goods therein, was not made felony by the last-mentioned statute.

The jury found the prisoner guilty of maliciously setting fire to his own goods in his own house, with intent, by burning the goods, to defraud the insurance office.

I reserved the question whether the act so found amounted to a felony, but sentenced the prisoner to three years' penal servitude, on which sentence he is still in custody. J. BARNARD BYLES.

The material count in the indictment charged, that the prisoner feloniously, wilfully and maliciously set fire to certain goods and chattels of him the said Aaron Lyons, to wit, one straw mattress, 1000 lucifer matches, &c., then being in a certain house situate, &c., and then in the possession and occupation of the said Aaron Lyons, with the intent, in so doing, to defraud the said insurance company, called and known by the name of The Shropshire and North Wales Assurance Company, against the form of the statute in such case made and provided, &c.

*Cook Evans*, for the prisoner.—It is submitted that the prisoner was not guilty of a felony either at common law, or under any statute. Arson at common law is maliciously and wilfully setting fire to the house, or outhouse of another man: (1 Hale P. C. 566; 1 Hawk. P. C. c. 39.) The offence of arson at common law might be committed by wilfully setting fire to one's own house, provided one's neighbour's house is also thereby burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another man's house: (4 Black. Com. 221.) And it was expressly decided in *Breeme's case*, 1 Leach, 195, 209, that if a tenant sets fire to the house of his landlord before the tenancy expires, he is not guilty of arson. To set fire to a house in a man's own occupation was first made felony by the 43 Geo. 3, c. 58, which is now re-enacted in the 7 Will. 4 & 1 Vict. c. 89. Sect. 3 of that statute enacts, that whosoever shall unlawfully and maliciously set fire to any house, &c., whether the same shall then be in the possession of the offender or of any other person, with intent *thereby* to injure or defraud any person, shall be guilty of felony. [BYLES, J.—The whole question turns on the meaning of the word "thereby" in this section.] That section only makes it a felony, if the house is set on fire. The intent to defraud to which the statute points, is by burning the house, and there is no provision for the case of merely burning the goods in

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the house. 2 Russell on Crimes, 550-2-3, was then referred to. It is contended, however, by the prosecution, that the 14 & 15 Vict. c. 19, s. 8, applies to this case. The latter part of that section enacts that "if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other act of Parliament, every such offender shall be guilty of felony." The words "any building" in this part of sect. 8, must be construed with reference to the buildings specified in the former part of the same section, which are "any station, engine-house, warehouse, or other building" belonging or appertaining to "any railway, dock, canal, or other navigation;" and "goods or chattels being in any building," in the latter part of the section, must be read "goods or chattels in any such building."

*Scotland*, for the prosecution.—It is submitted that the conviction is right. If the prisoner had set fire to the house, no doubt that would have been a felony within the 7 Will. 4 & 1 Vict. c. 89, s. 3. That being so, the case falls within sect. 8 of 14 & 15 Vict. c. 19, which enacts, that setting fire to goods in any building, the setting fire to which is made felony (as the setting fire to the house in which the goods were would have been) shall be guilty of felony. The word "building" in the latter part of sect. 8 is not limited to buildings of the same description as mentioned in the former part of the act, but extends to any building the setting fire to which is made felony by "any other act of Parliament," as by the 7 Will. 4 & 1 Vict. c. 89, and therefore to houses.

*Cook Evans* was heard in reply.

POLLOCK, C. B.—The Court are all of opinion that this conviction must be affirmed. The objection contended for by Mr. Evans is, with respect to the last clause of 14 & 15 Vict. c. 19, s. 8, "And if any person shall wilfully and maliciously set fire to any goods or chattels, being in any building, the setting fire to which is made felony by this or any other act of Parliament, every such offender shall be guilty of felony;" and he argues that we are not to construe that enactment in connection with the 7 Will. 4 & 1 Vict. c. 89. He contended that there was no act of Parliament by which it was made felony, to set fire to a mere building like those mentioned in the former part of the section, and therefore that the court ought not to construe the 14 & 15 Vict. c. 19, in connection with the 7 Will. 4 & 1 Vict. c. 89, as the present case was not provided for in express terms in the former statute. It is likely that, a century ago, when the courts applied a stricter construction, and every possible case was required to be expressly provided for, the objection might have prevailed. But that is not the present mode of construing acts of Parliament. They are now construed with a view to find out the true meaning and intention of the Legislature; and giving a reasonable and sensible construction to sect. 8 of the 14 & 15 Vict. c. 19, I think that the setting fire to goods in a house under the circumstances of this case, which are similar to those under which setting fire to a house was previously made

felony by statute, is indictable as a felony. To amount to felony, the setting fire to a house must be wilful and malicious, or some one must be in the house, or it must be with intent to defraud. Here the charge alleged is wilfully and maliciously setting fire to goods in a house in the occupation of the prisoner with intent to defraud an insurance company. I think that the count includes all that is necessary, and that the felony charged is brought within the acts of Parliament.

The rest of the Court concurring,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*November 22, 1858.*

(Before POLLOCK, C.B., WIGHTMAN, and WILLIAMS, JJ.,  
CHANNELL, B. and HILL, J.)

REG. v. HILTON AND McEVIN. (a)

*Indictment—Previous conviction—Evidence—Receiving.*

*It is no objection to an indictment that a previous conviction is stated at the beginning instead of, as usual, at the end of it.*

*Wherever it is stated, the proper practice is, not to charge the jury to inquire into it, until the new charge is disposed of.*

*The judge directed the jury that if they did not think from the evidence that the prisoner was participating in the actual theft, it was open to them on the facts to find a verdict of receiving :*

*Held, that the direction was quite right, as the facts were consistent with either charge, and the prisoner was charged in one count with larceny and in the other with feloniously receiving.*

THE following case was reserved by the Recorder of the Borough of Hastings:—

At the Quarter Sessions of the Peace holden for the borough of Hastings, on the 29th October last, Elizabeth Hilton and Joseph McEvin were tried (with William Robert Hilton, who was acquitted) on an indictment in the following words:—

Borough of Hastings, to wit.—The jurors for our lady the Queen upon their oaths present, that heretofore, to wit, at the General Session of the delivery of the Queen's gaol at Newgate,

(a) Reported by J. THOMPSON Esq., Barrister-at-Law.

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holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the city of London, on the 6th day of July, in the year of our Lord 1857, before certain justices of our said lady the Queen, assigned to deliver the said gaol of Newgate of the prisoners therein being, William Robert Hilton, by the name of William Henrick, was then and there convicted of felony; and which said conviction is still in full force, strength and effect, and not in the least reversed, annulled or made void. And the jurors aforesaid, upon their oaths aforesaid, do further present, that heretofore, to wit, at the General Session of the delivery of the Queen's gaol at Newgate, holden for the jurisdiction of the Central Criminal Court, at Justice Hall in the Old Bailey, in the suburbs of the city of London, on Monday, the 27th day of October, in the year of our Lord 1856, before certain justices of our lady the Queen, assigned to deliver the said gaol of Newgate of the prisoners therein being, Elizabeth Hilton, by the name of Elizabeth Mantrick, was then and there convicted of felony, and which said conviction is still in full force, strength and effect, and not in the least reversed, annulled or made void. And the jurors aforesaid, or their oaths aforesaid, do further present, that the said William Robert Hilton, late of the parish of the Holy Trinity, in the said borough of Hastings, labourer, being so convicted of felony as aforesaid, the said Elizabeth Hilton, late of the parish of the Holy Trinity, in the said borough of Hastings, single woman, being so convicted of felony as aforesaid, and Joseph McEvin, late of the said parish of the Holy Trinity, in the borough of Hastings aforesaid, on the 23rd day of August, in the year of our Lord 1858, with force and arms, at the parish aforesaid, in the borough aforesaid, and within the jurisdiction of the Court of General Quarter Sessions of the Peace of our said lady the Queen, within the said borough, one purse, containing several pieces of the Queen's current silver coin of the realm, together of the value of twelve shillings, of the moneys, goods and chattels of one John Goddard, from the person of Sarah Goddard his wife, then feloniously did steal, take and carry away, against the form of the statute made and provided, and against the peace of our lady the Queen, her crown and dignity.

*Second count.*—And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said William Robert Hilton, so being convicted of felony as aforesaid, the said Elizabeth Hilton being so convicted of felony as aforesaid, and the said Joseph McEvin, on the said 23rd day of August, in the year of our Lord 1858, with force and arms, at the parish last aforesaid, in the borough aforesaid, and within the jurisdiction last aforesaid, one purse, containing several pieces of the Queen's current silver coin of the realm, together of the value of twelve shillings, of the moneys, goods and chattels of one John Goddard, then lately before feloniously stolen, taken and carried away, feloniously did receive and have, they the said William Robert Hilton, Elizabeth Hilton and Joseph McEvin, then and there well knowing the said moneys,



goods and chattels to have been feloniously stolen, taken and carried away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

At the request of the counsel of the prisoners, and to prevent the prejudice against them likely to arise from the part of the indictment charging the former convictions being read in the hearing of the jury, in the first instance the prisoners were arraigned on those parts of the indictment only which charged subsequent offences, it being intended to postpone their arraignment on their former convictions, until the jury should have delivered their verdict on the subsequent offences.

The jury found Elizabeth Hilton guilty of stealing, and Joseph McEvin guilty of receiving the goods and moneys mentioned in the indictment.

Upon this the prisoner Elizabeth Hilton was about to be arraigned on that part of the indictment charging a former conviction, when Mr. Ribton, counsel for the prisoners, objected, contending that this was an irregular course, and could not be pursued. But the gentleman who appeared for the prosecution desiring, together with Mr. Ribton, that the matter should be reserved for the opinion of the Court for consideration of Crown Cases Reserved, I overruled the objection.

The prisoner Elizabeth Hilton, having been arraigned on the former conviction, to which she pleaded not guilty, the jury were then duly charged to inquire into the former conviction, and found that the said Elizabeth Hilton had been before convicted, as alleged in the indictment.

Mr. Ribton then moved in arrest of judgment, on the ground of the foregoing alleged irregularity, and also by reason of the indictment alleging that the former conviction "is still in full force, strength and effect, and not in the least reversed, annulled or made void," whereas by the expiry of the sentence, such conviction had become vacated.

As to Joseph McEvin, Mr. Ribton requested me to direct the jury that Joseph McEvin could not be convicted of receiving, on the facts hereinafter stated.

On the occasion in question Elizabeth Hilton was walking by the side of the prosecutrix, and McEvin was seen just previously following behind her. The prosecutrix felt a tug at her pockets, found her purse was gone, and on looking round saw Elizabeth Hilton behind her, walking with Joseph McEvin, in the opposite direction, and saw her hand something to Joseph McEvin.

I directed the jury that if they did not think from the evidence, that Joseph McEvin was participating in the actual theft, it was open to them on these facts, to find a verdict of receiving.

I respite judgment on the prisoners, in order that the judgment of the Court for consideration of Crown Cases Reserved might be ascertained on a case to be stated, and the foregoing is a statement of facts, on which the judgment of the Court is requested.

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The prisoners were committed to gaol to abide the said judgment.

WILLIAM WAKEFORD ATTREE,  
Recorder of Hastings.

*Ribton*, for the prisoners.—The indictment is bad, and the judgment ought to be arrested. The count contains introductory averments of previous convictions for felony against the prisoners. That is contrary to the object of the Legislature, as all recent legislation has been directed against prejudicing the minds of the jury by such averments: (*Reg. v. Key*, and *Reg. v. Shuttleworth*, 5 Cox Crim. Cas. 369; 3 Car. & Kir. 371.) [WIGHTMAN, J.—Is your objection that the averment of the previous conviction ought not to be at the beginning of the indictment?] I contend that it ought to form the subject of a separate count. If, as here, it is made part of the charge in the indictment, it must necessarily be submitted to the jury in the first instance, and thus the prejudice will be introduced, which the Legislature intended to prevent. [HILL, J.—That need not be done; and in this case it was not done. By the COURT:—There is nothing in this objection.] Secondly, I submit that the conviction of McEvin for receiving upon this evidence, was wrong. If guilty at all, he could only be convicted of the larceny upon this evidence, and so the recorder ought to have directed the jury. In *Reg. v. Perkins* (2 Den. C. C. 459), it was held that a principal in the second degree (*particeps criminis*) cannot be considered as a receiver. [POLLOCK, C.B.—Here the jury must be taken to have negatived that McEvin was acting in the theft.]

*Hurst*, for the prosecution, was not called upon.

POLLOCK, C.B.—There is no ground for either of these objections. As to the first objection, it is quite immaterial whether the previous conviction is alleged at the beginning or at the end of the indictment. And as to the second objection, the learned recorder told the jury, that if they did not think from the evidence that McEvin was participating in the actual theft, it was open to them to find him guilty of receiving. If the jury had found that the prisoners were acting with a common purpose, no doubt the stealing would then have been the act of both; but as they did not so find, I think the direction of the recorder was quite right.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 22, 1858.

(Before POLLOCK, C.B., WIGHTMAN, and WILLIAMS, JJ.,  
CHANNELL, B. and HILL, J.)

REG. v. DARIUS CHRISTOPHER. (a)

*Larceny—Finding lost property—Felonious intent at the time of finding  
—Subsequent felonious intent.**A finder of lost property is not guilty of larceny in appropriating it to his own use, unless he had, at the time of finding, a felonious intent.**Where a prisoner was found guilty of larceny, for appropriating property which he had found to his own use, on the direction of the judge, that the felonious intent might be inferred from the subsequent, as well as the immediate acts of the prisoner—such as, after having heard the public crier announce the loss, taking no steps to restore the property to its owner, but appropriating it to his own use—it was**Held, that the direction was erroneous, and the conviction was quashed, because it was consistent therewith that the felonious intention did not exist at the time of finding.*

**A**T the General Quarter Sessions of the Peace for the county of Dorset, holden at Dorchester on the 19th October, 1853, Darius Christopher was tried before me and other justices of the peace, on the following indictment:—

Dorsetshire, to wit.—The jurors for our sovereign lady the Queen, upon their oath present, that heretofore, to wit, at the General Sessions of the Peace of our lady the Queen, held at Dorchester, in and for the county of Dorset, on Tuesday the 29th day of November, in the year 1854, one Darius Christopher was then and there convicted of felony.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Darius Christopher being so convicted of felony as aforesaid, afterwards, to wit, on the 13th day of October, in the year 1858, at the parish of Stinsford, in the county of Dorset, four pounds in money, and two purses, of the goods and chattels of one Jane Lovell, feloniously did steal and carry away, against the form of the statute in such case made and

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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provided, and against the peace of our lady the Queen, her crown and dignity.

*Third count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Darius Christopher being so convicted of felony as in the first count of this indictment mentioned, afterwards, to wit, on the said 13th day of October, in the year 1858, at the parish of Stinsford aforesaid, in the county of Dorset aforesaid, four pounds in money, and two purses, of the goods and chattels of the said Jane Lovell, before then feloniously stolen and carried away, feloniously did receive, he the said Darius Christopher then well knowing the said goods and chattels last aforesaid to have been feloniously stolen and carried away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

It appeared from the evidence that the prosecutrix left her master's house between eleven and twelve o'clock in the morning of the 13th October to go to Dorchester (a distance of about a mile), having in her possession a purse of green leather (commonly called a portemonnaie), containing within it another smaller purse, about the size of half-a-crown, in which there were three sovereigns and two half-sovereigns. In the public path between Stinsford House and the first meadow, as she supposes, she dropped the purse, but thinking she might have left it on her table, she went on and returned home about one. Finding out her loss, she went in the afternoon to Dorchester and had the property cried by the public crier, describing it as a green leather purse and a smaller one inside, and that they contained three sovereigns and one half-sovereign, and half-a-crown, or 3*l.* 12*s.* 6*d.* (This was an error, as it really contained, as she found afterwards, two half-sovereigns instead of only one—4*l.* 2*s.* 6*d.*) About four o'clock the prisoner was at the Bull's Head public-house with a man named Upshall, whom he treats to beer, and paid for it with a sovereign which he took out of a purse. Whilst they were sitting at the table together in the tap, the crier came by and cried something. The landlady, Mary Jane Russell, went to the door to hear. Upshall asked her what it was cried; the landlady from the passage said, "Some money lost—3*l.* 12*s.* 6*d.*" Prisoner was taken up eventually at twelve o'clock at night at another public-house, and the two purses with six half-sovereigns, two shillings and sixpence in silver, and some pence, found upon him. The constable said, "These things were lost." Prisoner said, "Well, I know, I did pick them up." Constable said, "There was more money than this." Prisoner said, "I know I've done wrong."

On the part of the prisoner, it was contended that at the time he took the purse, which was admitted, he had no felonious intent: that there was no name or special mark on the purse or the money, and that therefore the subsequent appropriation did not amount to larceny; that though civilly, he was not criminally, liable; and the cases of *Reg. v. Mole*, *Thurborn's case*, and *Reg. v. Lathin* were cited.

I told the jury in summing up, that a felonious intent was

held to be a necessary ingredient in every larceny, but that intention was to be judged of by acts subsequent as well as immediate; that if they thought the conversion of the money to his own use without inquiry was proved, and that there was, though no name or mark on the purse, yet such peculiarity in it, as containing a second smaller one, as to warrant some inquiry; and above all, if they were satisfied that the prisoner when sitting in the public-house heard the words of the landlady, which Upshall said he heard, and then did not take measures to make restitution, that I thought they might infer felonious intention, and find him guilty.

The jury returned a verdict of guilty on the count for stealing. A previous conviction was then proved, and the prisoner was sentenced to six calendar months' hard labour.

On application of counsel for the prisoner, a case was granted and execution of the judgment respited till the decision of the Court above was known.

I respectfully submit the question, whether the above facts warranted in point of law the finding of the jury in this case.

CHARLES PORCHER,

Deputy Chairman of the Quarter Sessions.

*Flocks*, for the prisoner.—The conviction is bad, and ought to be quashed. The point is, whether a person who finds in a public highway a purse with money in it, not having any peculiar mark about it, so as to indicate who is the owner of it, and subsequently appropriates the money to his own use, without making any inquiry for the owner, is guilty of felony. [POLLOCK, C.B.—The question is rather this, whether there was any evidence to go to the jury, that at the moment when the prisoner found the purse and money, he intended to appropriate feloniously.] There was no evidence that he so intended. In 1 Hale P. C. 506, it is said: "If A. find the purse of B. in the highway, and take and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying it, or secreting it, yet it is not felony." In *Reg. v. Thurborn*, 1 Den. C. C. 388, it was decided that if a man find goods, which he has reason to suppose to have been lost, his subsequent appropriation of them will not be larceny, because he had no felonious intention at the time of finding. That case is exactly like the present, and this court is bound by it. It has been acted on and recognized in other cases, and in *Reg. v. Preston* (2 Den. C. C. 253; 5 Cox Crim. Cas. 390), Lord Campbell, C.J., expressed his strong approval of it. There was no mark or peculiarity in the purse to indicate its owner; whereas in *Reg. v. Preston*, there was the name of Collis on the note, and that was found to be an unusual name in the place where the note was lost. In the present case there was no evidence of any felonious intention at the time of finding; and the direction of the chairman was likely to mislead the jury, to suppose that a subsequent felonious intention was sufficient. [CHANNELL, B.—In *Reg. v. Preston*, Lord Campbell points out

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what the direction, in a case like the present, should be.] *Reg. v. Dixon*, 7 Cox Crim. Cas. 35; 25 L. J. 39, M. C. was also cited.

*Stock*, for the prosecution.—The present case is distinguishable from *Reg. v. Thurborn* and *Reg. v. Preston*. In the latter case it was held a misdirection, to direct the jury to consider, when the prisoner first resolved to appropriate the note, and that if they were of opinion that he knew the owner, or had reason to believe that the owner could be found, when he first resolved to appropriate the note, that that constituted larceny. The facts in this case differ from those in *Reg. v. Thurborn*, where it is conceded, that the law was correctly laid down. Here the jury must be taken to have found, that the prisoner intended at the time of finding, to appropriate the note to his own use. [WILLIAMS, J.—But there is no evidence of that, except the subsequent conduct of the prisoner.] Here the condition of the property found, one purse within another, on a road near a market town, affords reason for believing that the true owner could be readily found. [CHANNELL, B. referred to *Reg. v. Dixon*, 25 L. J. 39, M.C. where the case of *Reg. v. Thurborn* is recognized, and read the marginal note: “If a man find lost property and keep it, and at the time of finding it, have no means of discovering the owner, he is not guilty of larceny because he afterwards has means of finding him, and nevertheless retains the property to his own use.”]

POLLOCK, C. B.—I am of opinion that this conviction must be quashed. I think that we are bound by the authority of *Reg. v. Thurborn*, which establishes that there must be something more than was proved in this case, to bring home to the prisoner the felonious intention at the time of finding.

WIGHTMAN, J.—I am of the same opinion. The case of *Reg. v. Thurborn* has been recognized in subsequent decisions, and therefore I think that we are bound by it.

WILLIAMS, J.—I am of the same opinion. Though I consider myself bound by the decision in *Reg. v. Thurborn*, I am unable to agree with some of the principles laid down in that case. This case, however, is distinguishable. I think that the direction of the chairman of the quarter sessions was calculated to mislead the jury, and induce them to suppose that if the prisoner had a felonious intent subsequently to the finding, that was sufficient to constitute larceny. That, however, is not so; and here I think that the charge of larceny cannot be sustained, and that the conviction must be quashed.

CHANNELL, B.—I am of the same opinion. I think that *Reg. v. Thurborn* was correctly decided. And, looking at the rule, laid down in the cases of *Reg. v. Preston* and *Reg. v. Dixon*, I think that it is consistent with that in *Reg. v. Thurborn*. The question is, what was the prisoner's intention at the time of finding the purse and money? I am not prepared to say whether or not evidence of what subsequently occurred was admissible to prove that; but here the question as to the prisoner's intention at the time of finding was not left to the jury. The case states that the

chairman told the jury that a felonious intent was held to be a necessary ingredient in every larceny, but that intention was to be judged of by acts subsequent as well as immediate. It is quite consistent with that direction that the jury should find the prisoner guilty, though they were of opinion that the felonious intent to appropriate the money did not operate until subsequently. I think therefore that the conviction ought to be quashed.

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HILL, J.—I am of the same opinion. To establish the charge of larceny against a person who finds a lost article, it is necessary to prove two things; first, that at the time of the finding, the person had the felonious intent of appropriating the article to his own use, according to the rule mentioned by Lord Coke, and acted upon in *Reg. v. Thurborn*; and, secondly, it must be proved that he had a reasonable means of discovering the true owner of the article so lost. That may be the result of a previous knowledge, or may arise from the nature of the chattel found. It is not sufficient that by taking pains the owner may be found; there must be the immediate means of finding him. On both these points the present case is defective, and therefore upon the authorities the conviction cannot be supported.

*Conviction quashed.*

## WESTERN CIRCUIT.

CORNWALL WINTER ASSIZES, 1858.

*Bodmin, December 13.*

(Before Mr. Justice BYLES.)

REG. v. PRICE AND OTHERS.

*Murder—Evidence—Joint offence.*

*Six men assaulted another man. In the course of the assault one of them inflicted a stab and killed the person assaulted. They were jointly indicted for murder.*

*The judge instructed the jury:—*

*1st. That the man who stabbed was guilty of murder, whether he intended to kill or not.*

*2nd. That the other five would be guilty of murder if they participated in a common design to kill.*

*3rd. If there was no common design to kill, if the knife was used in pursuance of a common design to use it, they would all be guilty of murder.*

*4th. If there was no common design to use the knife, if being present at the moment of stabbing, they assented, and manifested their assent by assisting in the offence, they were guilty of murder.*

*5th. If neither of the last three modes of putting the case be proved against the five, they must find the stabber guilty, and acquit the rest.*

*6th. If they cannot ascertain which of them stabbed, they must acquit all.*

**I**NDICTMENT for murder.

*E. W. Cox and Powell for the prosecution.*

*H. T. Cole for the prisoner.*

The facts briefly stated were, that the prisoners, who were shipmates, for some cause of offence unknown, chased a German sailor belonging to another ship, through the streets of Falmouth, and as he took refuge from their attack against a railing, he was stabbed by one of them with a knife, of which wound he died in a few minutes. The evidence as to the hand by which the blow was



inflicted was very conflicting, two of the witnesses who saw the transaction at the same spot at the same moment differing in their identification, one of them swearing positively that the stabber was one of the prisoners who had whiskers, and the other as positively swearing that the murderer was another of the prisoners who had no whiskers; and each swore that he had marked his man at the time by this very peculiarity.

*E. W. Cox*, for the prosecution, contended that if a number of men go together for the purpose of committing an unlawful act, and in the doing of it one of them commits a murder, all are guilty of the crime; as in the *Sissinghurst case* (1 Hale, 461), where several persons resisted the execution of a warrant, and in the course of the riot a constable was killed, it was held that although it did not appear who gave the stroke, but only that it was given by one of them, it was sufficient, for the stroke of one was the stroke of all; and that all who were present and assisting in the riot were guilty of the death of the party slain, although they did not all actually strike him.

*H. T. Cole*, for the prisoner, contended that all could not be guilty of murder unless all had known that a knife was intended to be used by one of them. He cited *Duffey's case* (1 Lewin, C. C. 194), in which Parke, J., held that if three go out to commit a felony and one of them, unknown to the others, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty of it, notwithstanding it happened while they were engaged with him in the felonious act for which they went out.

*BYLES, J.*, in summing up, said that the law which he should lay down to the jury would be this:—Six men were charged with the wilful murder of a German sailor by stabbing him. The deceased was a peaceable unoffending person. The stab was given by one individual of the six. Now, supposing they could fix upon the hand that stabbed, the first question would be, what was his offence, and what was the offence of the other five? The individual who stabbed was clearly guilty of murder, whether he intended to kill or not. If he only intended to commit bodily harm it was murder. If they could point out the man who gave that stab, and they should be of opinion that they had selected the right man, he was guilty of murder. The next question would be, in what condition were the other five men? The deceased sailor was leaning against some iron railings when the stab was given, but before that he had been assaulted in a barbarous and dastardly manner by these six men; but did the other five men contemplate the use of the knife, or was it the independent act of the man who used it? First, then, they were all guilty of murder if they participated in a common design and intention to kill. If they should think the others did not intend and design to kill, yet these others would also be guilty of murder if the knife was used in pursuance of one common design to use it, because then the hand that used the knife was the hand of all of them.

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Supposing there was no common design to use the knife, if, being present at the moment of stabbing, they assented and manifested their assent by assisting in the offence, they were guilty of murder. First, then, there must be a common design to kill; secondly, there must be a common design to use a murderous instrument; and thirdly, there must be presence at the time, and assent to and assistance in the use of the knife. If, however, they should think neither of these three modes of putting the case proved against the five, it would be their duty to find the stabber guilty and to acquit the others. But it was clear they had been guilty of a barbarous assault; therefore, if they were acquitted of the more serious charge, he should take care that a bill should be presented that should meet the justice of the case.

*Verdict, Not Guilty.*

*Genn*, attorney for the prosecution.

*Stokes*, attorney for the prisoners.

## WESTERN CIRCUIT

CORNWALL WINTER ASSIZES, 1858.

(Before Mr. Justice BYLES.)

REG. v. HARVEY.

*Perjury—Indictment—Materiality—Practice—Amendment.*

*It is not necessary expressly to aver materiality in any indictment for perjury. It will be sufficient if materiality is clearly disclosed by the facts as stated on the face of the indictment.*

*If materiality is not sufficiently averred, or apparent, the defect is not cured by the provisions of 14 & 15 Vict. c. 100, s. 20.*

*Nor is it such a defect as the judge will amend under the provisions of sect. 25 of the same statute.*

**T**HE prisoner was indicted by the direction of the judge of the County Court under the provisions of the County Courts Act, for perjury committed in the County Court of Cornwall, and the form of the indictment<sup>(a)</sup> was as follows:—

Cornwall, to wit.—The jurors for our lady the Queen upon their oath present, that heretofore, on the 5th day of November, in the year of our Lord 1858, in the County Court of Cornwall, holden at Truro in the said county, before Charles Dacres Bevan, Esquire, judge of the said court, an action in which John Staff was the plaintiff, and Richard Williams Harvey, sued by the name of Richard Harvey, was the defendant, came on to be tried and was tried, in which action the said plaintiff “claimed to recover” (amongst other things) the sum of 2*l.* for the expenses of a journey from Sunderland to Falmouth, performed by him at the request of the said defendant, and also the sum of 23*l.* 17*s.* 2*d.* for wages claimed to be due from the said defendant to the said plaintiff, at the rate of 1*l.* sterling per week, and it was *thereupon proved*, on the part of the said plaintiff, that in the month of February last,

(a) Drawn by Mr. Archbold.

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the said defendant instructed Mary Ann Staff, the wife of the said plaintiff (the said plaintiff being then supposed to be at Sunderland), to "request him to come home to Penryn immediately, as he, the defendant, would appoint him master of a brigantine called the 'Caroline Alice.'" And it was also *then proved* that afterwards, and after the plaintiff had returned to Penryn as directed as aforesaid, the said Mary Ann Staff, in a conversation she had with the said defendant, complained to him of his delay in not sending her husband, the said plaintiff, to join the said brigantine, the "Caroline Alice," at Southampton, where the said brigantine then was, when the said defendant answered and said, "You are all right, your husband's wages are going on, and what more do you want, what does it matter to you how long he is at home?" And at the said trial it was also proved that, upon another occasion, the plaintiff remonstrated with the defendant at the delay in not sending him to join the "Caroline Alice," and that the said defendant then answered and said, "You are all right enough, your wages are going on, what more do you want? what matters it to you how long you stay at home? your wages are still going on." And the jurors aforesaid, upon their oath aforesaid, do further present that upon the trial aforesaid, the said Richard Williams Harvey, the defendant in the said action, did then appear and tender himself and was received to give evidence on behalf of himself, the said Richard Williams Harvey, as defendant as aforesaid. And that the said Richard Williams Harvey did then, in the court aforesaid, before the said Charles Dacres Bevan, Esquire, judge thereof as aforesaid, take his corporal oath and was then duly sworn upon the Holy Gospel of God, that the evidence he the said Richard Williams Harvey should give to the said court touching the matters in question, in the said action, should be the truth, the whole [truth, and nothing but the truth. And that thereupon the said Richard Williams Harvey, being so sworn as aforesaid, devising and wickedly intending to cause and procure a judgment to be given for him in respect of the matters in the said action hereinbefore mentioned, did then, to wit, on the day and year first aforesaid, upon the trial aforesaid, before the said Charles Dacres Bevan, Esquire, judge of the said court, falsely, maliciously, wilfully, wickedly, and corruptly, and by his own proper act and consent, upon his oath aforesaid, did depose, swear, and give evidence to the court aforesaid, amongst other things, in substance and to the effect following, that is to say, that he the said Richard Williams Harvey, "did not send for the plaintiff John Staff aforesaid, nor did he authorise any one else to send for him the said plaintiff" to come home. That in conversation between him and the wife of the plaintiff, upon any complaint she may have made at his delay in not sending her husband, the said plaintiff, to join the brigantine "Caroline Alice," he the said Richard Williams Harvey did not on that or on any other occasion say to her, the said Mary Ann Staff, "You are all right, your husband's wages are going on, and what more do you want, and what does it matter to you how long

he is at home?" nor did he ever say to her any words to the like effect. And that in any conversation he had had with the plaintiff, John Staff, when he complained of the delay in not sending him to join the "Caroline Alice," or on any other occasion, he, the said Richard Williams Harvey, did not say to the said plaintiff, "You are all right enough, your wages are going on, what more do you want? what does it matter to you how long you stay at home? your wages are still going on," or words to that or the like effect. Whereas in truth and in fact the said Richard Williams Harvey did send for the plaintiff to come home; and whereas in truth and in fact the said Richard Williams Harvey, in the month of February last past, did instruct the said Mary Ann Staff to write to her husband the said plaintiff, who was then supposed to be at Sunderland, or shortly expected to be there, and request him to come home to Penryn immediately, as he, the said Richard Williams Harvey, would appoint him master of a brigantine "Caroline Alice." And whereas in truth and in fact, at several times between the 26th day of March and the 23rd day of May last past, when the said Mary Ann Staff complained to him the said Richard Williams Harvey of his delay in not sending her husband the said John Staff to join the brigantine "Caroline Alice," the said Richard Williams Harvey did say to the said Mary Ann Staff, "You are all right, your husband's wages are going on, and what more do you want, and what does it matter to you how long he is at home?" And whereas in truth and in fact, on several occasions between the 26th day of March and 23rd day of May last past, when the said John Staff had remonstrated with the said Richard Williams Harvey at the delay in not sending him to join the "Caroline Alice," the said Richard Williams Harvey answered and said to him, "You are all right enough, your wages are going on, what does it matter to you how long you stay at home? your wages are still going on." And the jurors aforesaid, upon their oath aforesaid, do say that the said Richard Williams Harvey, on the trial of the said action, on the day and year first aforesaid, before the said Charles Dacres Bevan, Esquire, judge of the court aforesaid, falsely, maliciously, wilfully, and wickedly, in manner and form aforesaid, did commit wilful and corrupt perjury; in contempt of our said lady the Queen, to the damage of the said John Staff, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

*E. W. Cox* and *E. Powell*, for the prosecution.

*H. J. Cole*, for the prisoner.

*Cole* objected to the indictment, that it contained no averment of materiality. Although there was no express decision upon the point, all the cases showed that materiality to the issue being a necessary part of the offence, it was as essential to be averred as in larceny to aver that the goods were taken feloniously. It was the essence of the crime. He referred to *R. v. Bartholomew* (1 C. & K. 366), and in *Gardener's case* (8 C. & P. 737), both of which were

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decisions as to what was a sufficient averment of materiality, and to *R. v. Goodfellow* (Car. & Mar. 569), in which Patteson, J. held that an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said B. upon his oath," was not a good averment of materiality. If it was not necessary to aver materiality at all, these questions whether the averment is sufficient, could not have arisen.

*E. W. Cox*, for the prosecution, contended, first, that it was not necessary expressly to aver materiality; it is enough that it appears upon the face of the indictment that the alleged perjury was material to the issue in point of fact: (*Dowlin's case*, 5 T. R. 318; *Nicholl's case*, 1 B. & Ad. 21; *Bignold's case*, 2 Russ. 639.) Here it was abundantly shown that the perjury assigned was material. The question in the County Court was whether the now defendant had made any such promise to the plaintiff. His admissions of such a promise were the best evidence of it; his denial of those admissions constituted the perjury, and their materiality was obvious. But even if, under the former state of the law, such an averment was necessary, he contended, secondly, that it was rendered no longer necessary by reason of the provisions of 14 & 15 Vict. c. 100, s. 20, which enacts, that in every indictment for perjury, "it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, &c., without setting forth the bill, &c., or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed." Materiality was essential to the offence, and by this statute it was enough to set forth the substance, that means, the facts,—and materiality would be implied. Thirdly, he contended that the court had power under sect. 25 of the same act, to amend any formal defect, and would exercise it in such a case as this.

*Cole*, in reply, argued that the express averment could not be rendered unnecessary by any inferences from facts stated in the indictment. The rule was, that every ingredient necessary to constitute the crime should be charged against the prisoner. That rule had not been altered by the statute referred to, which related merely to the manner of setting out the perjury. As the objection was not a mere matter of form, but went to the substance of the indictment, it was not a case in which the judge could exercise his power of amendment.

BYLES, J. said, that with respect to the suggested amendment, he would at once say that it was not one which ought to be made. The objection was not to a mere form, but that this indictment was altogether bad as showing no offence, and it was not the design of the statute to cure substantial defects of that nature. He was also clearly of opinion that the 20th section of the stat. 14 & 15 Vict. c. 100, did not cure the objection, if such it was. The statute merely directed that certain things formerly required

should not be necessary, and this was not one of those named. There remained, therefore, only the question whether it was necessary that materiality to the issue should be expressly averred. Looking at the cases cited, he had come to the conclusion that it was not necessary, but that it would suffice if the materiality could be gathered from the whole indictment, and if the assignment of the perjury showed upon the face of the indictment that they were material to the issue. Here it was stated that there was a cause in the County Court, that the plaintiff demanded of defendant a certain debt; that this debt was sought to be proved by certain statements made by the defendant; that the defendant denied upon oath that he had made such statements; whereas, in truth and fact, he had made them. It appeared, therefore, upon the face of the indictment that the statements alleged to be so falsely and corruptly denied were material to the issue. But should it become necessary he would reserve the point, if desired by Mr. Cole.

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The statements of the prisoner had not been taken down, and they were proved from memory by the attorney for the plaintiff in the cause, who had conducted it in the County Court. Some observations having been made upon the Judge of the County Court not having been called to prove his notes,

*E. W. Cox* said that he considered it to be so extremely objectionable to put a judge into the witness-box to prove his notes, and thus to subject him to the comments of counsel, that he had thought it best not to place the judge who had directed this prosecution in so unpleasant a position.

*BYLES, J.* said that the judges of the superior courts ought not, of course, to be called upon to produce their notes. If he were to be subpoenaed for such a purpose he should certainly refuse to appear. But the same objection was not applicable to the judges of the inferior courts. He saw no reason why they should not be called, and especially where, as in this case, the judge was willing to appear.

*E. W. Cox* said that the judge was unavoidably absent at his court some miles away, and could not possibly be present then. If he had been, he should still have entertained very great doubts as to the propriety of calling him.

*BYLES, J.*, in summing up, said that this case differed from almost any case of perjury he remembered, in this, that it consisted in a denial of words alleged to have been spoken, and not of acts denied to have been done. A man was not likely to make a mistake as to what he had done, but he might very well forget what he had said, and, therefore, the jury would look at the case of spoken words much more leniently. Besides, the memories of the hearers of words spoken are apt to be treacherous; few of them could probably recal the precise words of the sentence he had last spoken to them; but when charging a serious offence like perjury, it was essential that the very words spoken should be proved, because the whole meaning of a sentence might turn upon the change, omission,

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or addition of a single word. In this case it seemed that the very words were not taken down at the time by any person.

*Verdict, Not Guilty.*

*Bullmore*, attorney, for the prosecution.

*Stokes*, attorney, for the defendant. (a)

## COURT OF CRIMINAL APPEAL.

*November 13, and January 15, 1858.*

(Before COCKBURN, C.J., WIGHTMAN and WILLIAMS, JJ.,  
CHANNELL, B. and HILL, J.)

REG. v. CUNNINGHAM AND TWO OTHERS. (b)

*Wounding at sea—Venue—Inland sea—Fauces terræ—Grievous bodily harm—Unlawful wounding—Finding of one prisoner guilty of the felony, and another of the misdemeanor, on the same count.*

*Upon a count of an indictment of three prisoners, for feloniously wounding with intent to do grievous bodily harm, two were convicted of the felony, and the third of the misdemeanor of unlawfully wounding :*

*Semble, that it was competent to the jury to do so.*

*The offence was committed on board an American ship, in the Penarth-roads, Bristol Channel, three quarters of a mile from the coast of Glamorganshire, at a spot never left dry by the tide, and lying between Glamorganshire and the Flat Holms (an island commonly treated as a part of the county of Glamorgan), the ship being at the time two miles from the island, on the inside; it was about ten miles to the opposite shore of Somersetshire, and ninety miles from the roads to the mouth of the Channel :*

*Held, that the part of the sea where the vessel was, formed part of the county of Glamorgan, and that the venue " Glamorgan," in the indictment, was right.*

THE following case was reserved at the Summer Assizes for the county of Glamorgan, by Crompton, J. :—

(a) From the experience of this case I would take the liberty of recommending to the judges of the County Courts, whenever they contemplate directing a prosecution for perjury under the power given to them by the statute, to direct the registrar to take down the questions and answers verbatim, giving notice to the witness of the purpose, and then to have them read slowly and distinctly to him, and asking him "if he still adhered to that statement?" If persisted in, the registrar should produce the notes at the trial.

(b) Reported by J. THOMPSON, Esq., Barrister-at-Law.



The prisoners, who were stated by the prosecutor's counsel, in his opening, to be American subjects, though no proof was given of that fact, were indicted before me at the last Summer Assizes for the county of Glamorgan, for feloniously wounding Edward Riley, in the county of Glamorgan, with intent to do him some grievous bodily harm.

Cunningham and Summers were convicted of the felonious wounding, and Brown of the misdemeanor of maliciously and unlawfully wounding.

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The prisoners were the three mates of the American ship, the *Gleaner*, and Riley was a seaman on board the said ship. The *Gleaner* sailed from the docks of Cardiff on the 29th of May last, and proceeded to an anchorage ground in Penarth-roads, where she anchored in eleven fathoms.

The offence in question took place shortly before the arrival at the above anchorage ground, and when the ship was three-quarters of a mile from land, in a place never left dry by the tide, but she was a quarter of a mile from the land left dry by the tide. The shore of the county of Glamorgan extends many miles up and down the Bristol Channel, from the place where the offence was committed. The spot in question was in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and was about ten miles or more from the opposite shore of Somersetshire. Penarth-roads are ordinary roadsteads for ships coming into Cardiff, or calling there for orders, and large vessels anchor there.

Two islands, called the Flat and Steep Holms, are outside the anchorage ground, and further from the shore than it is, but not lower down the Channel, being abreast of the anchorage grounds. It is about ninety miles from Penarth-roads to the mouth of the Channel.

When the offence was committed, the ship was inside, and about two miles from the Flat Holms, and four or five miles from the Steep Holms, and was within Lavernock-point in Penarth-roads, but outside Penarth-head.

Penarth-head and Lavernock-point form a bay. It is three miles from Lavernock-point to Penarth-head. Persons can see from one to the other, and could see what a vessel was doing from one to the other, but could not see the people from one to the other. From where the ship was, persons could see people at Lavernock, and see what they were doing if they took particular notice of them, and they could see the coast of Somersetshire on a clear day.

Flat Holms, Cardiff, Lavernock and Penarth are laid down properly in a map, shown to one of the witnesses (a pilot), from a map of counties, but Steep Holms is laid down too far to the west. The mouth of the Severn was proved to be at King's-road, higher up the Channel, and that is to be taken as the finding of the jury.

A person who had been clerk to the borough magistrates of

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Cardiff for five years, stated in his evidence that he knew The Holms; that they are part of the parish of St. Mary's, Cardiff; that he had issued a warrant for poor-rates there; that he had never executed any such warrant; they were given to the overseers. And a collector of the income-tax of the said parish said that he knew the Flat Holms, and that he had collected taxes from the occupiers of the Flat Holms, for St. Mary's parish.

The *Gazette* of Tuesday, January 4, 1848, was put in, containing an order of the Lords Commissioners of her Majesty's Treasury, whereby the limits of the port of Cardiff were to commence at the river Rumney, and continue along the coast of the county of Glamorgan to a place called Nash-point, in the said county, and that the limits seaward of the said port should extend to a distance from low-water mark of three miles into the sea, including all islands, rivers and creeks within the said limits. The place in question was within these limits.

It was proved by a witness that the port of Cardiff extends to the Nash-point, eighteen miles lower down the Channel than the place in question. Ships hail from Lavernock to the port of Cardiff. The Nash is marked with a × in the county map above referred to, and is two miles from St. Donat's and Lavernock to the place marked Aberthaw in that map, and is under the Custom-house at Cardiff.

A true chart of the places inside the Penarth-head accompanies this case. All in the chart is in the port of Cardiff. A pencil cross on the chart shows the place where the offence was committed at the mouth of the river Ely, being a quarter of a mile to sea beyond low-water mark, but in the port of Cardiff. A ship anchoring there would not pay harbour dues, and the place is not a harbour, but a roadstead. A clerk in the Cardiff Custom-house stated that he knew the limits of the port of Cardiff as read from the *Gazette*; that the officers of the customs of the port of Cardiff act within these limits, in every way that their duty requires; but he said, on cross-examination, that he was a clerk, and had executed no official duty except at the office; that the creek of Aberthaw was within the port of Cardiff, and that he had attended with the comptroller at a survey on that creek, but he did not appear to have personally seen any other exercise of jurisdiction within the limits.

The indictment, charging the offence to have been committed in the county of Glamorgan, and not being framed under the 7 & 8 Vict. c. 2, as it contained no averment according to the 2nd section, that the facts had taken place on the high seas, raised the question whether the prisoners could properly be convicted of the offence in the county of Glamorgan, upon so much of the above facts as were properly admissible in evidence against the prisoners. And there was a further question, whether the prisoner Brown could be properly convicted of the misdemeanor of unlawfully wounding, on the same count upon which the two other prisoners were found guilty of the felonious wounding.

I sentenced the prisoners Cunningham and Summers each to six years' penal servitude, and the prisoner Brown to eight months' hard labour, and they are now in confinement under such sentences.

I reserved for the consideration of this Court the two questions—first, whether the prisoners were properly convicted of an offence in the county of Glamorgan; and secondly, whether the prisoner Brown was properly convicted of misdemeanor.

CHARLES CROMPTON.

*Hardinge Giffard*, for the prisoners.—The indictment alleges the offence to have been committed in the county of Glamorgan. If it had alleged the offence to have been committed on the high seas, a more difficult question might have been raised as to whether it was within *Marina Angliæ*, and whether the Lord High Admiral had jurisdiction. But at common law, the jurisdiction of the Court of Admiralty did not extend to matters happening within the county. And as it is alleged in the indictment, that the offence was committed within the county, it must be proved to have been so, but there was no proof of that in this case. It was resolved in *Constable's case* (5 Co. Rep. 107), that when the sea flows and has *plenitudinem maris*, the admiral shall have jurisdiction of everything done on the water, between the high-water mark and low-water mark, by the ordinary and natural course of the sea; and so it was adjudged in the case of *Lacy*, that the "felony committed on the sea *ad plenitudinem maris*, between the high-water mark and the low-water mark, by the ordinary and natural course of the sea, the admiral should have jurisdiction of; and yet when the sea ebbs, the land may belong to a subject, and everything done on the land when the sea is ebbcd, shall be tried at the common law, for it is then parcel of the county, and *infra corp. comitat.* So note, that below the low-water mark, the admiral has the sole and absolute jurisdiction; between the high-water mark and low-water mark the common law and the admiral have *divisum imperium* interchangeably, as is aforesaid, one *super aquam* and the other *super terram*." Here the spot where the offence was committed is beyond low-water mark, and *primâ facie* out of the body of the county. Neither is the spot *intra fauces terræ*, for an imaginary right line drawn from Penarth-head to Lavernock-point, would not include it. In 2 East's P. C. c. 17, s. 10, it is said: "In general it is said that such parts of the rivers, seas, or creeks are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale, in his treatise, "De Jure Maris," says, that "the arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. Hawkins, however, considers the line more accurately confined by other authorities, to such parts of the sea, where a man standing on the one side of the land, may see what is done on the other; and the reason assigned by Lord Coke in the Admiralty case, 13 Coke Rep. 52, in support of the county coroner's juris-

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diction, where a man is killed in such places, because that the county may well know it, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to be preferred." The common law has a concurrent jurisdiction with the Admiralty, in havens, creeks and rivers: (*Bruce's case*, 2 Leach, 1093.) Except for the stat. 15 Rich. 2, c. 3, it would seem that the admiral had no jurisdiction to inquire of the death of a man, and of a *mayhem*, done in great ships hovering in the main stream of great rivers: (1 East P. C. 368.) This is not a question as to the dominion of the Crown over those parts of the sea which are called the wastes of the Crown, but whether the part of the sea where this vessel was is within the county of Glamorgan. There is no presumption of law with reference to the boundaries of counties. And in *Reg. v. Musson* (27 L. J. 100, M. C.), the Court of Queen's Bench would not, in the absence of evidence, presume that the part of the seashore between high and low-water mark, was within the parish of the adjoining land. And the same rule seems to hold good in the present case. In the present case, it is contended that the ship was on the high seas; it may be within the dominion of England, but not in the county of Glamorgan, as charged in the indictment. The county ends at low-water mark, it must be presumed, unless there is evidence or some legal principle to the contrary. The ship here was not within a bay or a creek, or within the *fauces terræ*, unless that includes every spot that can be seen from the shore. [WIGHTMAN, J.—The spot is between the county of Glamorgan and two islands which are in the parish of Cardiff, which is in the county of Glamorgan. COCKBURN, C.J.—*Prima facie*, is not the sea within the outlying land and the county, in the county? The Bristol Channel is a great salt lake.] The county of Southampton includes the Isle of Wight, but it does not follow that the intervening sea is within the county of Southampton: (*The Attorney-General v. Parmeter*, 10 Price, 378; *Burton v. Bartholomew*, 6 Hen. 6, pl. 300; 4 Instit. c. 22; Hale, *De Jure Maris*, cap. 4.) The main sea or ocean is the same as the high seas. [COCKBURN, C.J.—The sea at this spot is an inland sea, and land-locked, and not part of the high seas, or the highway of nations, as you put it. WIGHTMAN, J.—The Boundary Act, 2 & 3 Will. 4, c. 64, s. 26, and sched. M. annexes the Flat Holms to Glamorganshire.] That is for the purpose of electing members to Parliament. St. Martin's-le-Grand is within the city of Westminster, but it is entirely isolated, and the intervening space is within the city of London. There are many similar instances of isolated parishes, where the intervening space is in a different parish. As to the second question, whether the prisoner Brown could properly be convicted of a misdemeanor, this raises a metaphysical difficulty. On the indictment, the jury had no power to find one guilty of felony and another of misdemeanor. There is not the same intent found, whereas one common intent is charged in the indictment.

*Bowen*, for the prosecution.—The indictment is sufficient, even

if the offence was not committed within the county of Glamorgan, provided it was within the jurisdiction of the Admiralty: (7 & 8 Vict. c. 2.) By sect. 2, the venue in the margin is sufficient; and though that section further required an allegation in the body of the indictment that the offence took place "on the high seas," yet since the 14 & 15 Vict. c. 100, s. 23, the venue in the margin is to be taken as the venue for all the facts stated in the body of the indictment: (*Reg. v. Jones*, 1 Den. C. C. 101.) But, secondly, this offence was committed within the county of Glamorgan. The anchorage ground where the ship was lying, was within *fauces terræ*, and also within the port of Cardiff: (2 East P. C. 802; *Rex v. Bruce*, Lord Hale, *De Jure Maris*, p. 47; *Constable's case*, 5 Co. Rep. 107; and 1 Russell on Crimes, 181.) [COCKBURN, C.J.—It could be seen what the vessel was doing, but the people could not be seen.] The place is part of the port of Cardiff. [COCKBURN, C.J.—The port of London extends to parts of the counties of Essex and Kent.] As to the second point reserved, there is no question that all the prisoners could have been found guilty of misdemeanor upon this indictment: (14 & 15 Vict. c. 19, s. 5.) In two or three cases like the present a verdict of felony has been given against one prisoner, and of misdemeanor as against another, without being questioned. [WIGHTMAN, J.—Mentioned a case to this effect that occurred on the Midland Circuit. See also *Reg. v. Archer* (1 Car. & K. 174.)]

*Giffard*, in reply.—As to the objection to the verdict, the jury cannot find different intents on a count charging one common intent: (*Reg. v. Bird*, 5 Cox Crim. Cas. 1; 2 Den. C. C. 94.) This objection, however, is not now relied on, as Brown's imprisonment has nearly expired. Then, as to the main point. The town of Newport is included in the port of Cardiff, yet that is in the county of Monmouth. Here the vessel was at sea and could sail away, without touching any part of the coast. Here the vessel was not *intra fauces terræ*, so that a man could reasonably discern from the one point to the other. The sea is of common right: (*Reg. v. Serva*, 1 Cox Crim. Cas. 292; 1 Den. C. C. 104; *Reg. v. Sattler*, 7 Cox Crim. Cas. 431; 27 L. J. 48, M. C.) There is no presumption, apart from the acts of ownership and dominion, as to the boundaries of counties, or their shape. There is no notice in the books of "inland seas," or other than the high seas. The gradual accretion of land, or of an island arising in a river, is exceptional. Here the offence should have been stated to have been committed on the high seas.

COCKBURN, C.J.—In this case we are of opinion that the conviction is right, and that there is no ground for quashing it. The only question which it becomes necessary for us to deal with, is the one raised in the case, as to whether the part of the sea on which the vessel was, at the time the offence was committed, forms part of the body of the county of Glamorgan. And we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which it is well known, formed part of England and Wales—of

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the county of Somerset on the one side, and of the county of Glamorgan on the other. Now we are of opinion, looking at the local situation of this sea, that it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact that the islands of the Holms, between which and the shore of the body of the county, the place in question is situated, has always been treated as part of the county of Glamorgan, and as part of the parish of Cardiff, is a strong illustration of the principle on which we proceed—viz., that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties, by the shores of which its several parts are respectively bounded. We are therefore of opinion, that the place in question is within the county of Glamorgan, and that the conviction is right.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*November 10, 1858.*(Before COCKBURN, C.J., WIGHTMAN and WILLIAMS, JJ.,  
CHANNELL, B. and HILL, J.)

REG. v. HEPPINGSTALL (a)

*Misdemeanor—Administering Croton oil—14 & 15 Vict. c. 19, s. 4—  
“Inflict bodily harm.”**The prisoner being about to leave his situation as manager of a shop, put into the sugar-basin which was to be used by X., his successor, a quantity of Croton oil (an acrid poison), as the prisoner said, to give X. a good scourging for having told stories of him (the prisoner). X. used some of the sugar, and suffered such dreadful bodily pain as to alarm his doctor for his life. The jury found a verdict of Guilty on a count for inflicting upon X. grievous bodily harm :**Quere, whether the prisoner had been guilty of an offence at common law, or under the stat. 14 & 15 Vict. c. 19, s. 4.***C**ASE reserved by Martin, B., at the York Summer Assizes, 1858.

The prisoner was tried before me at York.

The first count stated that the prisoner unlawfully and wilfully administered, and caused to be taken by Benjamin Fawcett, a quantity of poison—namely, Croton oil—with intent to pain, injure, and aggrieve him, and to do him bodily harm, by means of which administering he became sick, sore and disabled, and suffered great bodily pain and harm.

The second count was founded on the stat. 14 &amp; 15 Vict. c. 19, s. 4, and stated that the prisoner unlawfully and maliciously inflicted upon Benjamin Fawcett, grievous bodily harm, that is to say, that he administered poison—namely, Croton oil—with intent unlawfully to pain, &amp;c., and to do bodily harm, by means of which Benjamin Fawcett suffered and underwent great pain, and grievous bodily harm.

The evidence at the trial was, that the prisoner had been manager of a shop at Silkstone for Messrs. Armitage, and was about to leave, and that Benjamin Fawcett, the injured person, came there

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to be his successor; that the prisoner knowingly and unlawfully put into the sugar-basin which was to be used by Benjamin Fawcett for his tea, a quantity of Croton oil; that Benjamin Fawcett used some of the sugar, and immediately became unwell, and for several hours suffered dreadful pain and agony, so much so as to alarm the medical man who attended him for his life.

The statement of the prisoner was, that he gave the Croton oil to Fawcett, because he was determined to give him a good scourging, for that he had told so many stories of him (the prisoner) since he had come to the shop.

It was proved that Croton oil is a very acrid poison and highly dangerous; that it was occasionally administered as a medicine, and is the most powerful purgative known; that one drop is the usual dose, and that a teaspoonful of the sugar used by Fawcett, contained rather more than three drops. Fawcett had taken two cups of tea, and had put a teaspoonful of the sugar into each cup.

The jury found the prisoner guilty.

I request the opinion of the Court of Criminal Appeal, whether the facts are evidence to go to the jury of an indictable misdemeanor, either at common law or by statute.

*Price*, for the prisoner.—The conviction cannot be sustained. There was no offence either by statute or at common law. The 14 & 15 Vict. c. 19, s. 4, contains a recital and an enactment: "it is expedient to make further provision for the punishment of aggravated assaults; be it enacted, that if any person shall unlawfully and maliciously inflict upon any other person, either with or without a weapon or instrument, any grievous bodily harm, or unlawfully, &c., cut or wound any other person, he shall be guilty of a misdemeanor, &c." Unless an assault is committed this section cannot apply, and the cases show that the administering a noxious drug does not amount to an assault. In *Reg. v. Hanson* (4 Cox Crim. Cas. 138), the prisoner was proved to have put some cantharides into some rum, which he gave to the prosecutrix to drink; and it was held not to be an assault, nor within the 7 Will. 4 & 1 Vict. c. 85, s. 5, which makes it a felony to cause to be taken by any person any dangerous or noxious thing with intent to harm, maim, or disable, or to do grievous bodily harm. *R. v. Walkden* (1 Cox Crim. Cas. 282), is to the same effect. The word "inflict" in the statute is inapplicable to a case like the present, and denotes a personal conflict or assault. Secondly, this is not an offence at common law. The distinction between public crimes and private injuries is pointed out in 4 Black. Com. 5. Setting fire to a field of ripe standing corn was only a private injury, though this is an act, as pointed out in Christian's edition of Black. Com., which strikes at the very root of society. [COCKBURN, C.J.—Actual corporeal violence is not necessary to lead to a breach of the peace. Why may it not be caused by administering a drug, which necessarily causes great bodily pain?] What can more endanger the public safety than placing things on a railway? And yet this was first made an offence (misdemeanor) by



the 3 & 4 Vict. c. 97, s. 15, and afterwards turned into a felony by the 14 & 15 Vict. c. 19, s. 7. [WIGHTMAN, J.—Does the word “inflict” in 14 & 15 Vict. c. 19, s. 4, necessarily import some violence to be used? Is it not sufficient to include this case?] In *Reg. v. Walkden*, where cantharides was administered in ale as a joke, Parke, B. ruled that it did not constitute an assault, or a felonious causing to be taken a dangerous and noxious thing under 7 Will. 4 & 1 Vict. c. 85. “Inflict” imports something done manually by the person charged. In *Reg. v. Mountford* (1 Mood. C. C. 441), the sending a tin box filled with gunpowder and peas to the prosecutor, so contrived that the prosecutor should set fire to the powder by opening the box, was held not to be an attempt to discharge loaded arms within the 9 Geo. 4, c. 31, s. 11. [COCKBURN, C.J.—If the enacting words of sect. 4 are large enough to include the present case, are we to say that it is not within the enactment, because the recital does not precisely hit it?] The prisoner’s intent was not to do anything more than affect the boy’s bowels. [COCKBURN, C.J.—If I understand your argument, it is this, that there is no provision to meet the case of administering a drug, and causing any amount of bodily suffering, short of death, and that it is no offence. Now, if the words of the enactment in question are large enough to meet such a case, ought we to restrain them because of this recital?]

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*Bliss*, for the prosecution.—According to the argument on the other side, the administering of poison so as to cause the most aggravated suffering short of death, if without the intent to murder, is not punishable by the law of England. There is no decided case in point. To administer poison with intent to murder is murder, and with any other intent, if death ensue, it is manslaughter. “If A. gives purging comfits to B. to make sport, and not to hurt him, and B. dies thereof, it is a killing by A., but not murder, but manslaughter:” (Hale P. C. 413.) If B. survives, is not A. punishable? If a person is bound to maintain a child, and neglects to give it proper food, whereby the child’s health is impaired, that is a misdemeanor. In Hale P. C. 433, it is said, “If a woman be quick or great with child, if she takes or another gives her any potion to make an abortion, or if a man strikes her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet *in rerum naturâ*, though it be a great crime.” If there is a duty in a parent to provide proper food for a child, and the neglect of that duty is punishable, *à fortiori* should the administering of poison be punishable. So it is laid down in Hale P. C. 432, that though a man infected with the plague goes abroad, and another is thereby infected, if the man have not the intent to infect the other, it is not felony, yet it is a great misdemeanor. *Vaux’s case* (4 Co. Rep. 44), was also referred to. So in *Reg. v. Saunders and Archer* (Plowd. 473), it was held, that if A. intending to kill his wife gives her a poisoned apple, and she, being ignorant of it, gives it to a child, against whom A. never meant any harm, and

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against his will and persuasion, and the child eats it and dies, this is murder in A. and a poisoning by him, but the wife, because ignorant, is not guilty. As to the count upon the stat. 14 & 15 Vict. c. 19, s. 4, the word "inflict" is sufficiently large to include this case. The words are, "inflict with or without any weapon or instrument," showing how generally it was intended the enactment should be construed. It may be construed in the sense of causing any grievous bodily harm. If a man were to kindle a charcoal fire, and so cause serious injury short of death to another, that would come within the act.

*Price*, in reply.—In *Reg. v. Gray* (7 Cox Crim. Cas. 326), it was held, that a woman who exposed her infant child in a field with intent that it should die, could not be indicted under the 7 Will. 4 & 1 Vict. c. 85, s. 2, for causing the child a bodily injury dangerous to life, as there was no lesion of any part of the organs of the child. In *Reg. v. Philpott* (6 Cox Crim. Cas. 140), it was held that if a woman wilfully abandons her infant child, of too tender years to provide for itself, she is not indictable at common law, unless her abandonment cause an injury to the health of the child. [WILLIAMS, J. referred to *Reg. v. Pelham* (8 Q. B. 959), where treating a person of unsound intellect, under the care of the defendant, improperly and neglectfully, as to food, clothing, &c., was held not indictable where no duty was shown, and there was no evidence that the conduct of the defendant occasioned actual injury. HILL, J.—As to the intention to do grievous bodily harm, that is concluded by the finding of the jury.] The learned counsel then referred to the meanings given to the word "inflict" in Johnson's Dictionary.

*Cur. adv. vult.*

*January 15, 1859.*

COCKBURN, C.J. said, that the prisoner having died since the argument of the points reserved, the Court would not deliver any judgment.

## COURT OF CRIMINAL APPEAL.

*January 22, 1859.*

(Before Lord CAMPBELL, C.J., MARTIN, B., CROWDER and WILLES, JJ., and WATSON, B.)

REG. v. ROBINSON. (a)

*False pretences—7 & 8 Geo. 4, c. 29, s. 53—Chattels—Dog.*

*A dog is not included in the term "chattels" in the 7 & 8 Geo. 4, c. 29, s. 53, and is not the subject of the misdemeanor of false pretences. Such things only are included in that enactment as were the subjects of larceny at common law.*

THE following case was reserved by the Recorder of Liverpool:—

The prosecutor, who resided at Hartlepool, was the owner of two dogs, which he advertised for sale. The prisoner, Samuel Robinson, having seen the advertisement, made application to the prosecutor to have the dogs sent to him at Liverpool on trial, falsely pretending that he was a person who kept a man-servant. By this pretence the prosecutor was induced to send the dogs to Liverpool, and the prisoner there obtained possession of them, with intent to defraud, and sold them for his own benefit.

The dogs were pointers, useful for the pursuit of game, and of the value of 5*l.* each.

At the Liverpool Borough Sessions, holden in December, 1858, the prisoner was indicted, convicted, and sentenced to seven years' penal servitude, under the statute 7 & 8 Geo. 4, c. 29, s. 53.

On behalf of the prisoner a question was reserved, and is now submitted for the consideration of this court:—

Whether the said dogs were chattels, within the meaning of the said section of the statute, and whether the prisoner was rightly convicted.

The prisoner remains in the Liverpool borough goal, under the sentence passed at sessions.

GILBERT HENDERSON, Recorder of Liverpool.

*Littler*, for the prisoner.—The conviction is bad. The word

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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"chattel" in the 7 & 8 Geo. 4, c. 29, s. 53, relating to false pretences, includes only such "chattels" as were the subject of larceny at common law. Dogs were not the subject of larceny at common law, "for they are of a base nature, and howsoever they may be valued by the owner, shall never be so highly regarded by the law that for their sakes a man shall die:" (Hawk. P. C. c. 33, s. 36; Bracton, lib. 2, c. 1; Lombard's Eirenarcha, 267.) And, moreover the 7 & 8 Geo. 4, c. 29, s. 31, provided for the offence of dog-stealing for the first time a fine; and for a second and subsequent conviction imprisonment, not exceeding twelve months. Then the 8 & 9 Vict. c. 47, s. 2, for the further prevention of dog-stealing, makes it for the first offence a misdemeanor, punishable summarily, the imprisonment not to exceed six months; and for the second offence an indictable misdemeanor, the imprisonment not to exceed eighteen months. [Lord CAMPBELL, C.J.—So that, if the prisoner had been indicted for stealing the dogs, he would only have been liable to six months' imprisonment; but because he is indicted for obtaining the dogs by false pretences, he gets seven years' penal servitude.] It could never have been the intention of the Legislature to include in the 7 & 8 Geo. 4, c. 29, s. 53, obtaining dogs by false pretences, when by section 31 of the same statute a milder punishment had been enacted for dog-stealing.

*Brett*, for the prosecution.—No doubt a dog is a chattel, and would literally fall within the meaning of that word in sect. 53. [Lord CAMPBELL, C.J.—A dog would pass to the executor under the word "chattels."] So it may be the subject of an action of trover: (Com. Dig. "Trover.") In *Ireland v. Huggins* (Cro. Eliz. 125), it is said that the law takes notice of a mastiff, hound, spaniel, and tumbler: (see also *Wright v. Ramscott*, 1 Saund. 84.) The reason why a dog was not the subject of larceny at common law seems to be that the party stealing it would have been in danger of his life. But there is a distinction in the case of false pretences, which is founded on the doctrine of cheating at common law, and for which life was not in danger: (Hales P. C. 511.)

Lord CAMPBELL, C.J.—This conviction cannot be sustained. There is a specific mitigated punishment in the 7 & 8 Geo. 4, c. 29, s. 31, for dog-stealing, but it is not larceny at common law; and if it is not, I am of opinion that it is not, within this statute, the subject of false pretences. Are we to suppose that the Legislature intended that, for obtaining a dog by false pretences, a man should be liable to penal servitude, but that if he actually steals a dog, he should only be liable to three months' imprisonment? It seems to me quite clear that it was not the subject of larceny at common law; and I am of opinion, as Coleridge, J. ruled, that the term "chattels" in the section relating to false pretences applies only to such things as were the subject of larceny at common law.

WILLES, J.—From the Year Books downwards, including the case of *The Swans* (7 Co. Rep. 15), dogs have always been held not to be the subject of larceny at common law.

The rest of the Court concurring,

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*November 22, 1858, and February 5, 1859.*

(Before POLLOCK, C.B., WIGHTMAN, WILLIAMS, BYLES, and HILL, JJ.)

REG. v. WILLIAM BERRY (a)

*Larceny—Wife and adulterer jointly taking the husband's property—  
Direction to the jury.**A., being about to elope with B.'s wife, engaged a porter to bring his cart to the husband's house, which he did; and A. then assisted the wife in packing up the husband's property, and placing it in the cart. A., the wife, and her three children then went away with the things to a distant place, where the wife took lodgings in her own name, and afterwards A. and the wife being found living there, A. was charged with stealing the things:**Held, that it was a proper direction to the jury to tell them that, if they were satisfied that A. and the wife, when they so took the property, went away together for the purpose of having, and afterwards had, adulterous intercourse, they ought to find the prisoner guilty; but that if they believed that they did not go away with any such purpose, and had not committed adultery together, the prisoner was entitled to an acquittal.***T**HE following case was reserved and stated by M. B. Armstrong, Esq., Q. C., the Recorder of Manchester.

William Berry was indicted at the General Sessions for the city of Manchester, held at Manchester on the 2nd August, 1858, and was found guilty of stealing one bed, two boxes, four pairs of blankets, six sheets, two dresses, and two carpets, belonging to Robert Elliot, of the value of 5*l.* and more, in his dwelling-house.

On the 5th June, and for six months previous, the prisoner lodged at the house of the prosecutor, and knew that the prosecutor would have to go out very early that morning. On the 4th June, the prisoner engaged a porter to be near the prosecutor's house at seven o'clock the next morning, with his cart. He went there. The prisoner came to him, and took him to the door of the prosecutor's house, where he drew up his cart. The prisoner and the

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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wife of the prosecutor were there together in the house, and were jointly engaged in packing up the articles mentioned in the indictment, in boxes, and when so packed up, the prisoner brought the boxes to the door, and the carter assisted him to put them upon the cart. They were driven to the railway station, the prisoner, the prosecutor's wife and three children accompanying them, and all left by the train for Leeds.

A fortnight after this, the prisoner and the prosecutor's wife were found living together, in a house in Leeds, which she had taken in her own name. They were both in the house when the prosecutor and an officer went there, and the property so taken from the prosecutor's house at Manchester was found there.

The prosecutor's wife was called on behalf of the prisoner, and swore that they had not gone away for the purpose of carrying on an adulterous intercourse, and, in fact, never had committed adultery together.

I told the jury that, if they were satisfied that the prisoner and the prosecutor's wife, when they so took the property, went together for the purpose of having adulterous intercourse, and had afterwards effected that criminal purpose, they ought to find the prisoner guilty; but if they believed the wife, that they did not go away with any such criminal purpose, and had never committed adultery together at all, the prisoner would be entitled to his acquittal.

The jury found him guilty.

The question for the opinion of the Court of Criminal Appeal is, whether my direction was right.

Sentence was deferred, and the prisoner was admitted to bail.

M. B. ARMSTRONG,  
Recorder of Manchester.

No counsel appeared on either side.

*February 5, 1859.*

POLLOCK, C.B.—The conviction in this case will be affirmed.  
*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 22, 1859.*

(Before Lord CAMPBELL, C.J., MARTIN, B., CROWDER and WILLES, JJ., and WATSON, B.)

REG. v. RICE AND THREE OTHERS. (a)

*Indictment—Stealing fixtures—Lead—What is a building—Wharf.*

*A count in an indictment charged the prisoners with stealing "lead fixed to a certain wharf." The evidence showed that the lead stolen, formed part of the gutters of two sheds, constructed of bricks, timber and tiles on the wharf:*

*Held, that the word "wharf" was sufficient to comprehend the sheds, and that the prisoners might properly be convicted under the 7 & 8 Geo. 4, c. 29, s. 44, on this count.*

CASE reserved by the Chairman of the Second Court for the trial of prisoners, at the Surrey Sessions.

At the General Quarter Sessions of the peace, holden by adjournment at Saint Mary Newington, in and for the county of Surrey, on Monday, 19th of July, 1858, Samuel Rice, Timothy Foley, Benjamin Johnson and John Preedy, were tried and convicted under an indictment, containing the two following counts:—

Surrey, to wit.—The jurors for our lady the Queen upon their oath present, that Samuel Rice, Timothy Foley, Benjamin Johnson and John Preedy, on the 26th day of June, 1858, 850lbs. weight of lead, the property of William Randall Wood, then being fixed to a certain wharf of the said William Randall Wood, situate in the parish of Wandsworth, in the county of Surrey, feloniously did steal, take and carry away, against the form of the statute in such case made and provided.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Samuel Rice, Timothy Foley, Benjamin Johnson and John Preedy, on the same day, and in the year aforesaid, 850lbs. weight of lead, of the property of William Randall Wood, feloniously did steal, take and carry away, against the form of the statute in such case made and provided.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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From the evidence given on the trial of the prisoners, it was proved that the lead stolen formed the gutters of two sheds on the wharf of the prosecutor, which sheds were constructed of brick, timber and tiles, with lead gutters.

At the trial, the jury found a general verdict of guilty against all the prisoners, upon both of the counts above set forth; and the Court reserved the following points for the consideration of this Court:—

First, whether the allegation in the first count that the lead was fixed to a wharf, is sufficient to show that it was fixed to a building, within the meaning of the 7 & 8 Geo. 4, c. 29, s. 44.

Secondly, could the prisoners be convicted on the second count of simple larceny, there being no evidence of the stealing of any other lead than that which had been affixed to the wharf.

The Court postponed judgment, and committed the said Samuel Rice, Timothy Foley, Benjamin Johnson and John Preedy to prison, until the question above mentioned should have been considered, and determined.

*Laxton*, for the prisoners.—The first count of the indictment is framed upon the 7 & 8 Geo. 4, c. 29, s. 44, which enacts, that if any person shall steal (*inter alia*) any lead, &c. fixed in or to any building, he shall be guilty of felony. No doubt the sheds alluded to in the evidence would constitute a building within the above enactment: (*Reg. v. Worrall*, 7 C. & P. 516.) But the objection is, that there is a variance from the description in the indictment, which charges the prisoners with stealing “lead fixed to a wharf.” The word “wharf” is not in the section creating the offence, and in its ordinary sense it means a place for loading and unloading vessels. [CROMPTON, J.—May not a wharf be a building? Lord CAMPBELL, C.J.—It is a generic term, and includes a building. Must the term “wharf” be confined to ground? Were not these sheds part of the wharf?] A wharf, properly speaking, is a plain flat surface bordering on a river. [WATSON, B.—A wharf is not complete without a covered roof, otherwise the goods would be exposed to the weather.] Some wharves require no roofs, as coal and timber wharves. There are also floating wharves. [Lord CAMPBELL, C.J.—This is proved to be a wharf, with fixed sheds on it.]

*Knapp*, for the prosecution, was not called upon.

Lord CAMPBELL, C.J.—I am of opinion that the conviction was right. We are called on to presume that a wharf with sheds upon it, constructed of brick, timber, and tiles, with lead gutters, is a floating wharf. That would be a strange inference to draw. It is said that the indictment should have charged the stealing from a building affixed to a wharf. These sheds were part of the wharf, and it is enough if the indictment charges the stealing of lead fixed to that which may be a building. The burden of proof was therefore sustained, when it was shown that there was a building on the wharf, to which the lead was attached.

MARTIN, B. concurred.



CROWDER, J.—I concur in the decision, on the ground that the term “wharf” in the indictment may fairly be taken to include the two sheds, which constituted part of the wharf.

WILLES, J. and WATSON, B. concurred.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*January 29, 1859.*

(Before Lord CAMPBELL, C.J., MARTIN, B., CROWDER and WILLES, JJ., and WATSON, B.)

REG. v. JAMES BERRY. (a)

*Perjury—Bastardy—Application for summons against putative father—Hearing—Waiver of irregularity on application for summons—7 & 8 Vict. c. 101, s. 2—Proof.*

*A summons, after the birth of the child, under 7 & 8 Vict. c. 101, s. 2, against the putative father, was issued on the personal application of the mother of the bastard child, not upon oath.*

*Semble, that before the summons issued there should have been evidence on oath of payment of money for the maintenance of the child by the putative father :*

*The putative father appeared to the summons, and defended the case on the merits, without objecting that the summons had issued on the statement of the woman, not on oath :*

*Held (Martin, B. dissentiente), that the putative father could not afterwards raise the objection :*

*Held, also (Martin, B. dissentiente), that he was liable to be indicted for perjury committed by him on the hearing of the summons :*

*Held, also, (per totam curiam) that evidence of payment of money by the putative father within twelve months of the birth of the child, being evidence of the paternity, was a material fact on the hearing of the summons.*

THE following case was reserved by Hill, J. :—

At the Winter Assizes, 1858, for Liverpool, James Berry was tried before me for perjury.

(a) Reported by J. THOMPSON, Esq. Barrister at-Law.

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Materiality—  
Evidence.

The perjury was alleged to have been committed upon the hearing of a summons, a copy of which is as follows:—

“To James Berry, of Worsley, in the county of Lancaster, gamekeeper.

“County of Lancaster. } Whereas application hath been this  
Petty Sessional Division of } day made to me, the undersigned, one  
Manchester, to wit. } of her Majesty’s justices of the peace  
for the county of Lancaster, by Martha Humphreys, single woman, residing at Eccles, in the Petty Sessional Division of Manchester, in the said county of Lancaster, for which I act, who hath been delivered of a bastard child, since the passing of the act of the eighth year of the reign of her present Majesty, intituled ‘An Act for the further Amendment of the Laws relating to the Poor in England,’ and more than twelve calendar months from the date hereof, and of which bastard child she alleges you to be the father, and that you have paid money for its maintenance, within twelve months after its birth, for a summons to be served upon you to appear at a petty session of the peace, according to the form of the statute in such case made and provided.

“These are therefore to require you to appear at the Petty Sessions of the Justices holden at the Court-house in Worsley, in the said county of Lancaster, being the Petty Sessions for the Division of Manchester, in which I usually act, on Wednesday, the 17th day of November instant, at one of the clock in the afternoon, to answer any complaint which she shall then and there make against you, touching the premises. Herein fail not. Given under my hand, at the Court-house in Worsley aforesaid, this third day of November, in the year of our Lord 1858.

“H. L. TRAFFORD.

“*Note.*—If you neglect to appear at the Petty Sessions as above stated, the justices, upon proof that this summons has been duly served upon you, or left at your place of abode, may proceed, if they think fit, to make an order upon you, as the putative father of the child above referred to, to pay a weekly sum to the said mother for its maintenance, and other sums for costs and expenses.”

When the summons came on to be heard, James Berry appeared personally in answer thereto; he was also assisted by an attorney. No objection was made to any of the proceedings on which the summons was founded, and the case was gone into on the merits, before the stipendiary magistrate who heard the same.

Upon the hearing of the summons Martha Humphreys proved, that she had lodged at Mrs. Sutcliff’s house in Salford, for eleven months before the birth of the child (April 12, 1856); that James Berry had visited her there constantly; that James Berry was the father of her child; that James Berry visited her constantly at the same place after the birth of the child, and paid her money; that on the day after the birth of the child, James Berry paid her 1*l.* 7*s.* 6*d.*, and that he paid her a weekly sum for several weeks after.

Other evidence having been given in support of the summons, in answer thereto, James Berry was sworn as a witness on his own behalf, and he deposed amongst other things, "that he never paid Martha Humphreys any money at all, on any account whatever," and "that he never was in Sutcliff's house in Salford," meaning Mrs. Sutcliff's house in which Martha Humphreys lodged.

It was further proved upon the trial before me, that the summons was issued by Mr. Trafford, on the personal application of Martha Humphreys, who stated on such application, *but not on oath*, that she had been delivered of a bastard child more than twelve months previous, and that money had been paid by James Berry, the father of the child, for its maintenance within twelve months from its birth.

It was objected at the trial before me, by counsel for James Berry, that the magistrate had no jurisdiction to hear the summons, as there had been no information in writing, and no proof on oath of money having been paid for the maintenance of the child within twelve months from its birth, and that such information and proof were requisite prior to the issuing of the summons under 7 & 8 Vict. c. 101, s. 2, and 8 & 9 Vict. c. 10.

It was also objected that it was immaterial at the hearing of the summons, whether moneys had been paid or not, as proof of that fact was necessary only prior to the issuing of the summons.

I stated to the jury that, if the materiality of the matter sworn were a question of law, I thought it material, upon the question of paternity, whether the alleged father had paid money towards the expense of the confinement and the maintenance of the child, but that I should leave the question of materiality to them, with the other facts.

The jury found the prisoner guilty.

I postponed the sentence, and reserved the objections taken by the prisoner's counsel, for the judgment of the Court for the consideration of Crown Cases.

HUGH HILL.

*Atkinson*, Serjt. (Dr. *Wheeler* with him), for the prisoner.—As to the assignments of perjury on payment of the moneys by the prisoner, that was an assignment of perjury on an immaterial matter. The question at the Petty Sessions was not paternity. That must be taken to have been disposed of prior to the issuing of the summons. [Lord CAMPBELL, C.J.—Was it not essential that paternity should be shown?] This objection was then given up. Then as to the other objection, that the information on which the summons issued was not on oath. As it was not upon oath, the proceeding at the Petty Sessions was without jurisdiction. The point depends on the construction of the 7 & 8 Vict. c. 101, s. 2, which enacts that any single woman who may be with or has been delivered of a bastard child, may, upon proof that the man alleged to be the father of such child, has within twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace acting for

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the petty sessional division of the place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child, and if such application be made before the birth of the child, the woman shall make a deposition upon oath, stating who is the father of such child, and such justice shall thereupon issue his summons to the person alleged to be the father of such child, to appear at a petty session to be holden at, &c. Then sect. 3 provides how the justices are to proceed, on the appearance of the defendant at the petty sessions. The only other section bearing on the point is sect. 70, which speaks of "proof on oath." Now it is submitted that the proof in sect. 2 on the application for the summons against the putative father, can only be satisfied by proof on oath. The summons states that the mother alleges the man to be the father, and that she has given proof that he paid money for its maintenance. [Lord CAMPBELL, C.J.—This must be considered a civil proceeding, and then, if there was any irregularity in the issuing of the summons, was not that waived by the appearance?] No; this is a penal proceeding, and the proof of the information on oath was necessary to give jurisdiction to issue the summons. The provision in the act, that such information should be given, was not introduced for the benefit of the putative father, but to found the jurisdiction of the justices. It was not therefore a matter which could be the subject of waiver; (Broom's Maxims, 552, 2nd edit.) [MARTIN, B.—The point is, whether the objection to the summons ought not to have been taken by the prisoner when he appeared at the petty sessions.] The question of payment of money within twelve calendar months forms no part of the evidence on the hearing. What is the meaning of proof? Is it the effect of evidence, or the means? If it is the latter, it must be evidence on oath. In *Reg. v. Scotton* (5 Q. B. 493; 13 L. J. 58, M. C.) it was held that an information under the Game Act must be laid by a person deposing on oath to the matter of charge. If this is left doubtful by the information, all further proceedings upon it are without jurisdiction; and if the defendant is summoned, and appears to answer the charge, a witness giving false evidence on the hearing cannot be convicted of perjury. That was a case like the present. There it was argued that the defect was cured by the appearance of the defendant. Proof in sect. 2 necessarily means proof on oath.

*R. A. Cross*, for the prosecution.—The objection is untenable. Sect. 2 does not require the proof upon the application for the summons to be upon oath, and it need not be so. Then, as this does not go to the jurisdiction of the justices to act, the objection was waived by the defendant's appearing to the summons, and not objecting. The Statute of Labourers gives a magistrate jurisdiction to examine upon oath any servant, &c., and to make order for payment of wages; and it was held in *Wilson v. Weller* (1 Bro. & B. 57), that the master having appeared to a summons under the statute, and an order having been made on him for the payment of wages, and a distress issued to enforce it, he could not be relieved.

set up, that the servant did not duly make oath before the magistrate, that the sum claimed was justly due to him for wages. [MARTIN, B.—Would a mere statement not upon oath do, under sect. 3?] Perhaps not; but sect. 2 does not say proof upon oath, neither does the form in the schedule say proof upon oath. Under the 11 Geo. 2, c. 19, s. 16, empowering magistrates to give possession to landlords of deserted premises, it has been held that it is not necessary that the information or complaint should be made on oath, in order to give jurisdiction: (*Basten v. Carew*, 3 B. & C. 649.) In *Reg. v. Millard* (22 L. J. 108, M. C.) it was held that it was not necessary that there should be an information on oath, to give the magistrate jurisdiction to hear a case under the Malicious Trespass Act, 8 Geo. 4, c. 30, s. 24, when the defendant appears to the summons, to answer the charge. In that case the objection was taken, as here, upon an indictment for perjury committed upon the hearing of the summons. This is only an error in procedure, not jurisdiction. [Lord CAMPBELL, C.J.—After the defendant does appear, the woman must still give proof on oath of the necessary matters.] In *Reg. v. The Justices of Wiltshire* (12 A. & E. 793) it was held that the putative father, by attending at the petty sessions, and not objecting to the want of seven days' notice, but desiring the justices to remit the charge to the quarter sessions, and duly entering into the required recognizance, could not afterwards object to the want of such seven days' notice to appear at the petty sessions. [MARTIN, B.—That is not very strong in your favour. There it was held that the defective summons to the petty sessions was not material, because, by desiring the case to be remitted to the quarter sessions, the putative father had himself established a new court of trial.] *Reg. v. Stoddart* (1 Gale & D. 654) accords with *Reg. v. The Justices of Wiltshire*. *Rex v. Stone* (1 East, 639); and *Rex v. Carnarvon* (5 Nev. & M. 364), were also cited.

*Atkinson*, Serjt., was heard in reply.

*Cur. adv. vult.*

Lord CAMPBELL, C.J.—In this case a summons was granted by a justice of the peace under the 7 & 8 Vict. c. 101, and the 8 Vict. c. 10, on the application of the mother of a bastard child, against the defendant as the putative father, more than twelve months having elapsed from the birth of the child, he having, within the twelve months next after the birth of the child, paid money for its maintenance. The summons was according to the form given by the 8 Vict. c. 10, sched. 6, except in saying that the mother alleged that the defendant had paid money for the maintenance of the child within twelve months after its birth, instead of saying that she had given proof of this fact. The defendant duly appeared at the petty sessions, according to the exigency of the summons, being assisted by an attorney. He made no objection to the form of the summons, nor to any of the proceedings on which the summons was founded, but denied the paternity, and denied that he had paid any money for the main-

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tenance of the child within twelve months after its birth, or at any other time. The case was then gone into on the merits, and proof being given of the paternity, and of the payment of the money by the defendant for the maintenance of the child within twelve months after its birth, the defendant presented himself as a witness on his own behalf, and having on oath denied the paternity, swore that he had never paid any money for the maintenance of the child. Among other assignments of perjury, was one upon the defendant's statement in his evidence that he had never paid any money for the maintenance of the child. At the trial before my brother Hill, J. strong evidence was given in support of this, and the other assignments of perjury. It was further proved, that the summons was issued by a magistrate on the personal application of the mother, who had stated, but not on oath, that she had been delivered of a bastard child more than twelve months previously; and that money had been paid by James Berry, the father of the child, for its maintenance, within twelve months from its birth. It was then objected by counsel for the defendant, that he could not be indicted for perjury in respect of what he had sworn at the hearing of the case at petty sessions; that the summons was insufficient, as no proof on oath had been given before the magistrate of the payment of the money having been made for the maintenance of the child previously to the issuing of the summons; and, further, it was objected that the assignment of perjury on what the defendant swore respecting the payment of this money, was on a matter immaterial to the hearing of the summons. The defendant being convicted, both points were reserved by the learned judge for the opinion of this court. As to the second objection, we never entertained the smallest doubt, clearly thinking that there was proof at the hearing of payment of the money by the defendant as alleged; and further, that his payment of money for the maintenance of the child was corroborative evidence of the paternity. So far we were all agreed. As to the first objection, we took time to consider. After examining the Acts of Parliament and the authorities upon the subject, I am of opinion that this objection ought to be overruled. The proceeding against the putative father of a bastard child to obtain an order of maintenance, is not a proceeding *in pœnam*, to punish for a crime, but merely to enforce a pecuniary obligation, and is a suit within the meaning of the 14 & 15 Vict. c. 99, ss. 2 and 3, for which reason the defendant was admitted as a witness on his own behalf. Then, what is the summons which we have to consider? The process to bring the defendant into court in a civil suit. I incline to think that, according to strict regularity, before the summons issued there ought to have been evidence on oath of the payment of the money: although it is not expressly required by the statute to be on oath, as in the case where the complaint is made before the birth of the child. Further, it would have been proper that the summons should have been in the form given by the act of Parliament. But, supposing that, if the defendant did not attend, the petty sessions could not

lawfully have proceeded to hear evidence of the paternity; or that, if he had appeared and objected to the regularity of the summons, the objection ought to have prevailed, I am of opinion that, when he actually did appear, and instead of objecting to the regularity of the summons, he asked the court to give judgment in his favour on the merits, and tendered evidence to absolve himself from liability, he waived any irregularity there might be in the process, and that, when he had thus subjected himself to the jurisdiction of the court, the court had jurisdiction to hear and decide the suit. No irregularity in the process to bring the defendant into court in a civil suit, can be taken advantage of by him after he has pleaded, and there has been judgment against him. The defendant's counsel chiefly relied upon *Reg. v. Scotton* (13 L. J. 58, M. C.) But that was a criminal proceeding, the information being on a penal statute to recover penalties for an offence created by Act of Parliament; and there the Act of Parliament expressly provides that, before any proceeding shall be had or taken on information, either for summoning the party accused, or compelling his appearance to answer the same, the charge contained in such information shall be deposed to on the oath of some person or persons other than the informer. On the information, a distinct deposition to the truth of the charge is made necessary before a magistrate can take cognizance of it. But the case of *Reg. v. The Justices of Wiltshire* seems to me expressly in point on the other side. That was a proceeding in bastardy. As the law then stood, the parish officers who applied for an order of maintenance, were bound to give the putative father seven days' notice of the application before the petty sessions. In that case the notice had not been regularly given, but the defendant appeared at the petty sessions, and, without objecting to the want of seven days' notice, desired the justices to remit the charge to the quarter sessions, and entered into the recognizance which the law requires; and it was held that he could not afterwards object that there was a want of jurisdiction to hear the case, as the appearance and the proceedings at the petty sessions waived the objection. Lord Denman says; "As to the want of proof of the seven days' notice required by the act, it is enough to say that the defendant appeared before the petty sessions, and did not insist on the want of notice." Littledale, J.: "Any objection that might have been made to the want of seven days' notice, was waived by the appearance, and by the steps taken by him before the justices in petty sessions." Williams, J.: "The want of a due notice, supposing none to have been given, was cured by what took place at the sessions." Coleridge, J.: "The answer to the objection, that no sufficient notice was given to appear at the petty sessions, is that the party has appeared, and, without objecting to the want of notice, has elected to have the case sent to the next quarter sessions, and entered into a recognizance accordingly. Now this cures the want of notice, and makes it unnecessary to consider whether there was one in fact, or whether it is sufficiently stated in the order." There are various other cases illustrative of the

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same principle to be found in the books. I do not consider it necessary to comment upon them, thinking that any irregularity in the form of the summons, or the manner in which it was granted, was waived and cured by the defendant having appeared, and, without objection, submitted to the jurisdiction of petty sessions. I am of opinion that the conviction was right, and ought to be affirmed.

MARTIN, B.—I dissent from the judgment of my brothers in this matter. I believe my brother Willes has considerable doubt about it; but, upon the whole, he concurs with the Lord Chief Justice and my brothers Crowder and Watson. I do not at all wish that the case should go any further, but my view of the matter is this: I think the jurisdiction is a special one, and to create it there must be proof on oath as a condition precedent, and no subsequent appearance can cure the defect. The distinction is to be taken between a court of general jurisdiction and a special one, and not between proceedings of a civil and criminal nature. I think the cases cited do not apply. In those cases the putative father was an active party in removing the case to quarter sessions, where the objections were taken for the first time.

*Conviction affirmed.*



## WESTERN CIRCUIT.

WINTER ASSIZES, 1858.

*Devizes, December 22.*

(Before Mr. Justice BYLES.)

REG. v. BARNES.

*Embezzlement—Clerk or servant.*

*B., being in difficulties, assigned all his book debts, estate and effects to trustees for the benefit of creditors. He was employed by the trustees at a salary, to manage the business and collect the debts for them. He received the amount of two of the debts, and did not account for it.*

*Held, 1st. That he was not a clerk or servant within the meaning of the act.*

*2nd. That inasmuch as the debts, being choses in action, could not be legally assigned, he had received only money which was in law, though not in equity, his own; and therefore, that he could not be guilty of embezzling it.*

**P**RISONER was indicted for that he being the servant of Joseph Hill and others, did embezzle two sums of 68*l.* 10*s.*, and 29*l.* 9*s.* 7*d.*, their property.

*Edlin*, for the prosecution.

*Cole*, for the prisoner.

It was proved that prisoner, who was a coal and timber merchant, fell into difficulties, and made an assignment of all his goods, effects, and book debts. After the execution of this assignment, he received the two sums of money in question, which had been debts previously due to him, and he had not accounted for the receipt of those sums. After the execution of the deed the prisoner had been employed by the trustees, at a salary, to conduct the business for the benefit of the trustees.

*Cole* submitted that the debts being only *choses in action* could not be assigned in law, they could only be sued for and recovered in the prisoner's name; and in law he was the person entitled to receive them; in fact, he received his own money.

*Edlin* contended that immediately on the receipt of the money by the prisoner it became the property of the trustees, and then the prisoner was guilty of embezzlement. }

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*Cole*, in reply. Embezzlement is the stopping of money *in transitu* to the employer. If rightly received by the prisoner, the keeping of it afterwards was not embezzlement. He could not be guilty of larceny unless the money was ear-marked, and if ear-marked, it was the debt supposed to be assigned, but which had not passed in law, only in equity.

BYLES, J. said, the difficulty was to make out that, in point of law, the prisoner was a clerk, or servant, or acting in the capacity of a servant within the meaning of the statute. It was clear that these debts were not assignable in law; they were *choses in action*, and the deed would only bind him in equity. The moment he received these moneys, they were his own moneys—he received what, in point of law, was his own money. How then, could he be guilty of embezzlement; or how could he be said to be clerk or servant to the trustees? He could not, in point of law, pass the property in the debts due to him before the deed was executed. His assignees were only equitable assignees; they could only sue in his name. The deed could only pass that which he actually had in his possession at the time the deed was executed. Under these circumstances the indictment could not be sustained.

The prisoner was, therefore, *acquitted*.

The prisoner was then indicted for embezzling a bill of exchange.

*Edlin* said that, after what his lordship had said, he had given the case the greatest consideration, and he therefore thought it right not to offer any evidence.

*Cole* said he should submit that the prisoner had not committed any offence, for the bill was not endorsed.

BYLES, J. said, in his opinion the prisoner was no more entitled to the property than he was. The only question was, whether he had brought himself within the statute; he thought he had not. If the prisoner had been convicted, he should have reserved the point, which would have entailed great expense on the prosecution. It was quite clear that the prisoner was neither a clerk nor servant within the meaning of this act of Parliament. As no evidence was offered, the prisoner would be acquitted.

*Verdict, Not guilty.*

## COURT OF CRIMINAL APPEAL.

*January 22, 1859.*

(Before Lord CAMPBELL, C.J., MARTIN, B., CROWDER and WILLES, JJ., and WATSON, B.)

REG. v. FLETCHER. (a)

*Rape—Definition of—Stat. West. 2, c. 34—Girl of imbecile mind—Against the will.*

*The crime of rape is the having connection with a woman forcibly, where she neither consents before nor after: (Stat. West. 2, 13 Edw. 1, c. 34). Therefore, where a man had carnal knowledge of a girl (aged thirteen) of imbecile mind, and the jury found that it was by force, and without her consent, she being incapable of giving consent from defect of understanding, this was*

*Held to amount to the crime of rape, although the jury did not find the offence to have been against the will of the girl.*

THE following case was reserved by Hill, J. :—

Richard Fletcher was tried before me, at the Winter Assizes, 1858, for Liverpool, upon a charge of rape committed upon the person of Jane Jones.

Jane Jones was proved at the trial to be of the age of thirteen years at the time of the offence charged; she was also proved to be of weak intellect, to be incapable of distinguishing right from wrong.

Her mother stated in her evidence, that Jane was not allowed to go about by herself, and that she was unable to distinguish the house in which she lived, from that of any of the neighbours. On the day in question Jane had left the house without her mother's knowledge; the prisoner met her, and it was proved by witnesses who saw them, that the prisoner had sexual intercourse with the girl; but she was not shown to have offered any resistance, though she did exclaim, whilst the prisoner was in the act, that he hurt her, and on the prisoner rising from her and her getting up, she made a start as if to run away.

The girl Jane Jones was placed in the witness-box, and I asked her several questions, in the hearing of the jury, to ascertain if she

(a) Reported by J. THOMPSON Esq., Barrister-at-Law.

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possessed sufficient intelligence to be sworn. I was satisfied that she did not.

It was objected by counsel for the prisoner, that the charge of rape was not made out, as it was not proved that the prisoner had carnal knowledge of the girl, against her will.

I left the case to the jury, and I stated to them, that if they were satisfied, upon the evidence, that the prisoner had carnal knowledge of the girl by force, and against the will of the girl, they ought to convict the prisoner. Also that if the jury should be of opinion that the girl was incapable of giving consent, or of exercising any judgment upon the matter, then if they were satisfied, upon the evidence, that the prisoner had carnal knowledge of the girl by force, and without her consent, they ought to find the prisoner guilty.

The jury found the prisoner guilty; and, in answer to a question from me, they stated that they considered that Jane Jones was incapable of giving consent, from defect of understanding.

I directed the verdict of guilty to be recorded, but postponed passing sentence, until the judgment of the Court for the consideration of Crown Cases could be obtained upon the case.

*R. A. Cross*, for the prisoner.—The conviction is wrong. The crime of rape is the carnal knowledge of a woman forcibly, and against her will: (1 Hawk. P. C. c. 16, s. 2; 4 Black. Com. 210; 3 Chit. Crim. Law, 810.) Although it has been decided that fraud may supply the place of force, yet the act must be proved to have been committed against the will of the woman. In *Reg. v. Camplin* (1 Cox Crim. Cas. 220), where the prisoner obtained the girl's person by means of stupefying her with liquor, it was held that the fraud supplied the place of force and violence; and the girl having refused her consent so long as she had the power, this was held to amount to rape. Where a surgeon pretended that he was treating a girl of fourteen medically, this was held to amount to assault: (*Reg. v. Case*, 4 Cox Crim. Cas. 220.) So where a man obtains the person of a woman by pretending to be her husband, it is not rape: (*Reg. v. Clarke*, 6 Cox Crim. Cas. 412.) The cases of *Reg. v. Saunders* (8 C. & P. 265), and *Reg. v. Williams* (Ib. 286), *Read's case* (1 Den. 377, and 1 East's P. C. 436), were then cited. [Lord CAMPBELL, C.J., called attention to the Stat. of West. 2, 13 Edw. 1, c. 34, which he said was still in force, and contained a definition of the crime of rape.] That statute depends on the meaning of the word "ravish." [Lord CAMPBELL, C.J.—Then what use was there in the words "where she did not consent, neither before nor after?"] "Ravish" implies that the act was committed by force. [Lord CAMPBELL, C.J.—The jury by the verdict must be taken to have found that.] It also in the language of the indictment includes "against the will" of the woman, and the jury have negatived that the offence was against the will. If the Stat. of West. 2 is against the prisoner, it would also apply to the case of children under ten, and the necessity for the statute 13 Eliz. c. 7, relating to girls under ten, could not have arisen. It was in consequence of the doubt

that existed whether a rape could be committed upon a girl under ten years of age, that the 13 Eliz. c. 2 was passed: (Dyer, 304; 1 East, P. C. 435.) Mr. East, in his commentary on that statute, says: "This offence is not properly speaking a rape, which implies a carnal knowledge against the will of the party, but a felony created by this statute, under which the consent or nonconsent of the child under the age of ten years is immaterial." The same reasoning holds good in the case of an idiot girl, and, therefore, unless the jury find the act to have been committed against her will, it does not amount to rape.

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*Joseph Kay*, for the prosecution.—The true definition of rape is the having unlawful connection and carnal knowledge of a woman by force, and without her consent. That this is so, appears from the Statute of West. 2, c. 34. But independently of this, there are authorities expressly in point. The case of *Reg. v. Camplin* (1 Cox Crim. Cas. 220) is directly in point. There the prisoner made the prosecutrix quite drunk, and while she was insensible violated her person; but the jury found that he gave her the liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having connection with her. Nevertheless, the prisoner was held to have committed a rape. In sentencing the prisoner, Patteson, J. said that "The evidence was that the young woman refused her consent, so long as she had sense or power to express such want of consent, and that the prisoner made her quite insensible by administering liquor to her, and whilst in that state, took advantage of it and violated her person, and that the case fell within those in which force and violence constitute the crime, but in which fraud is held to supply the want of both." In the report of the same case in 1 Denison's C. C. 68, the reasons for the judgment (furnished to the reporter by Parke, B.), are published, and it appears that several of the Judges who were in favour of the conviction, thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether such state is caused by the man or not, the accused knowing at the time that she is in that state; and Tindal, C.J. and Parke, B. remarked that, in Stat. West. 2, c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing her against her will. But all the ten judges agreed that where the prosecutrix was made drunk by the act of the prisoner, and that an unlawful act, and where also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, the offence of rape was committed." [Lord CAMPBELL, C.J.—The only distinction between *Camplin's case* and this is, that there the prisoner must have known that the act was against the prosecutrix's consent at the last moment she was capable of giving consent.] *Reg. v. Ryan* (2 Cox Crim. Cas. 115) was the case of an idiot, and Platt, B. questioned the father as to the general habits of the girl as to decency, with a view to test the probability of her

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having been a consenting party, and the girl being of decent habits according to the father's evidence, the case was left to the jury, and the prisoner found guilty. Platt, B. also told the jury that it would be rape, if the connection took place during a state of unconsciousness, whether produced by the act of the prisoner, or otherwise. [WILLES, J.—There was a case of the kind, where the girl was an idiot, tried before me, at the Old Bailey. I told the jury that, if she had been ravished without her consent, it was rape; but that if she gave her consent, though from an animal instinct, that would prevent the crime of rape from being committed. There was the evidence of a medical man that the girl had animal instincts of a strong tendency. Lord CAMPBELL, C.J.—That direction was in accordance with *Camplin's* and *Ryan's* cases. But in this case there is no evidence of that kind, but rather to the contrary.]

Lord CAMPBELL, C.J.—I am of opinion that the conviction must be affirmed. The case has been very well argued. The definition of rape may now be considered *res adjudicata*. The question is, what is the proper definition of the crime of rape? Is it carnal knowledge of a woman against her will, or is it sufficient, if it be without the consent of the prosecutrix? If it must be against her will, then the crime was not proved in this case; but if the offence is complete where it was by force and without her consent, then the offence proved that was charged in the indictment, and the prisoner was properly convicted. *Camplin's* case settles the definition of the offence, and all the ten judges concurred in that. That definition includes the present case, the only difference in this case being that pointed out, that here the prosecutrix was not capable of giving consent. But then the prisoner knew her condition at the time. This definition rests on the act of Parliament, West. 2, c. 34, which seems never to have been referred to in the cases. The definition given by that statute includes this case, "If a man ravish a married woman, dame or damsel, where she neither consented before or after, *ayt judgment de vy et member*; if she assent after, yet the King shall have the suit." "Ravish" there means having carnal knowledge of a woman by force, and the question then is, whether she consents either before or after. Nothing is clearer than this definition. It was adopted in *Camplin's* case, and acted on in *Ryan's* case. And Willes, J., acting on those cases, gave a direction to a jury in perfect harmony therewith. The law, therefore, must now be taken to be settled, and ought not to be disturbed. It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from market, and happening to fall down on the road side, may be ravished at the will of the passers by.

MARTIN, B.—I am of the same opinion. I am quite content to take the Stat. West. 2, c. 34, and follow the definition in it, and apply it to the facts.

CROWDER, J.—With reference to the statute, it has been argued, that the word “ravish” necessarily includes the notion, that it is against the will of the woman. It seems to me that it is impossible to suppose that it includes that.

The rest of the Court concurring,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*February 5, 1859.*

(Before POLLOCK, C.B., WIGHTMAN, WILLIAMS, BYLES, and HILL, JJ.)

REG. v. INHABITANTS OF EAST HAGBOURNE (a)

*Inclosure Act—Alteration of ancient road—41 Geo. 3, c. 109, s. 9—Want of certificate of justices—Liability of parish to repair.*

*On the trial of an indictment for nonrepair of a public carriage-road, it appeared that the road was an ancient one, and that about eighteen years previously it was altered, by straightening and widening it under an award of Inclosure Commissioners. The parish had repaired the road, both before and after the award. No steps were taken by the commissioners for putting the road into complete repair (41 Geo. 3, c. 109, s. 9), and there never was any declaration by justices that the road had been fully and sufficiently formed and repaired:*

*Held, that a conviction against the parish for the nonrepair of the road, could not be sustained.*

CASE reserved by Byles, J., at the Berkshire Summer Assizes, 1858.

The indictment charged the defendants with the nonrepair of a public carriage road, in the parish of East Hagbourne, called the Coscot and Didcot-road, branching out of a road called the Coscot and Wantage-road, near Coscot-cross, and leading into the Wellingford and Farrington turnpike-road.

The defendants pleaded that they were not guilty.

The facts, so far as material to the question of law reserved, were these:—

The road indicted, called the Coscot and Didcot road, was an

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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ancient public highway within the parish, leading from the Coscot and Wantage public road on the south, also within the parish, to Wallingford and Farringdon turnpike-road towards the north. Other roads, nearly opposite the communication of the indicted road with these two roads, branch off from these roads respectively. The road which branches off from the Coscot and Wantage public road on the south, is entirely, as to part of its length, in the indicted parish.

In the year 1840 the parish of East Hagbourne was inclosed, under the provisions of the public general act, 6 & 7 Will. 4, c. 115, which act incorporates, by sect. 52, the provisions of the General Inclosure Act, 41 Geo. 3, c. 109.

The inclosure award was published on the 14th of June, 1840.

Under the heading "Public carriage roads and highways," the award thus describes the road in question:—

"No. 2, Coscot and Didcot road. One public carriage road and highway, of the width of 30 feet, branching out of the public carriage-road called the Coscot and Wantage-road, at or near Coscot-cross, and thence, in or near its present track, by the west end of the parish into the Wantage and Wallingford turnpike-road."

All the other public roads in the parish are described by the award in the same manner.

The Inclosure Commissioners had, before the award, made some alteration in the original Coscot and Didcot-road, by straightening and widening it, but the whole of the original road is comprehended within the existing road, as set out in the award and described in the indictment.

The public can go from the point, where the indicted road leaves the Coscot and Wantage-road, to the point where it reaches the Wallingford and Farringdon-road by another road, called the New-road, which is an ancient public road, but the distance is nearly three times as great.

It is admitted by the defendants, that the road indicted is a public road; that the indicted parish has repaired it, both before and after the award; and that at the time of the indictment found it was out of repair.

It is admitted by the prosecution, that no steps were taken by the Commissioner for putting the road into complete repair (see 41 Geo. 3, c. 109, ss. 8 & 9), unless the contrary must be inferred from the foregoing extract from the award; that there never was any declaration by Justices at their special sessions that the road had been fully and sufficiently formed, completed and repaired, and that no proceedings had been taken under 5 & 6 Will. 4, c. 50, s. 23.

The indicted road passed through allotable land on both sides of it, except that Hagbourne-park, which is on a small portion of the east side of the road, is another inclosure.

So much of the plan annexed to the award, as shows the indicted road and the roads referred to in the above statement, is to form part of the case.



The defendants objected that the proviso in the 41 Geo. 3, c. 109, s. 9, applied to roads continued by the award, as well as to roads newly made under it, and that, as the road in question has not been, by Justices at their special sessions, declared to be formed, completed, or repaired, the parish were not at present chargeable with the nonrepair. They cited *R. v. Hatfield* (4 Ad. & Ell. 156).

The prosecutors insisted that the defendants were liable, and cited *Reg. v. Cricklade* (16 Q. B. 735). They further insisted that the road in question was a prolongation of old public roads in the parish, beyond the limits of the inclosure (see *Thackrah v. Seymour*, 1 C. & M. 18); and that the defendants, by repairing since the award, had waived any objection, and admitted their liability.

I reserved the objection for the opinion of the Court, and, subject thereto, advised the jury to find a verdict for the Crown.

J. BARNARD BYLES.

November 20.

*Gray* (G. Francis with him).—The defendants are exempt from any obligation to repair the road, which would have been cast upon them by the General Highway Act, 5 & 6 Will. 4, c. 50, by reason of the noncompliance with the directions in sect. 23. The question, therefore, turns upon the effect of the General Inclosure Act, 41 Geo. 3, c. 109. By sect. 8, the Commissioners are to set out and appoint public carriage-roads and highways over the lands intended to be allotted and inclosed. And sect. 9 provides for the fencing of the carriage-roads to be set out under sect. 8, and empowers the Inclosure Commissioners to appoint a surveyor for the first forming and completing such parts of the said carriage-roads as shall be newly made, and putting into complete repair such parts as shall have been previously made, and (after other provisions not material) the section enacts, that in case such surveyor shall neglect to complete and repair such carriage-roads within two years, he shall be subject to a fine, "and the inhabitants of the parish wherein such roads shall be situate, shall be in no wise charged or chargeable towards forming or repairing the said roads, except such proportion of such statute duty as aforesaid, till such time as the same shall, by such justices in their special sessions, be declared to be fully and sufficiently formed and repaired, from which time the same shall be supported and repaired by such persons and in like manner as the other public roads within such parish are by law to be amended and kept in repair." The road in question is an ancient road, altered by the Inclosure Commissioners in 1840, by straightening and widening it. It is contended that the 9th section applies to this road, and that as no steps were taken by the Commissioners for putting the road into complete repair, and as there was no declaration by justices in special sessions that the road had been fully and sufficiently formed and repaired, the obligation to repair is not cast on the parish. *Rez v. The Inhabitants of Hatfield* (4 A. & E. 156) is in point. There it was held that under sect. 9 of 41 Geo. 3, c. 109, a road con-

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tinued, as well as a road newly made under the award of Commissioners of Inclosure, must be declared by Justices in special sessions to be fully completed and repaired before the inhabitants of the district can be indicted for not repairing it. [BYLES, J.—The Inclosure Commission having expired, and there being no funds from that source, if the parish is not liable to repair the road, who is?] The same objection was urged in *Rex v. Hatfield*, but did not prevail. [HILL, J.—The parish having repaired the road since the inclosure award, can it now set up the want of the declaration of the justices required by sect. 9?] It is contended that it can. *Reg. v. The Inhabitants of Cricklade* (14 Q. B. 735) does not apply. There it was held that the road in question was not diverted or stopped up, and set out as a new one within the meaning of 41 Geo. 3, c. 109, and therefore that the parish continued liable to repair, as before the award of the Inclosure Commissioners. The statement of the present case shows that this road was altered within the meaning of the 41 Geo. 3, c. 109, ss. 8 & 9.

*Cripps* (H. James with him), for the prosecution.—In *Rex v. Hatfield*, there was not, as in this case, any evidence of the parish having repaired the road subsequent to the award of the Inclosure Commissioners, and after that, they have no right to object that the declaration of the Justices in special sessions was not obtained as required by sect. 9. It does not appear that any surveyor was appointed, in pursuance of sect. 9; and if not, the justices could not certify for want of his report. [BYLES, J. referred to *Reg. v. The Inhabitants of Midville* (4 Q. B. 240.)]

*Cur. adv. vult.*

February 5.

POLLOCK, C.B.—The Court is of opinion that the conviction cannot be sustained.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

February 5, 1859.

(Before POLLOCK, C.B., WIGHTMAN, WILLIAMS, BYLES, and HILL, JJ.)

REG. v. WILLIAM ROWE. (a)

*Larceny—Iron found in the bed of a canal whilst being cleansed — Possession of canal company.*

*Iron found in the bed of a canal during the course of cleansing was returned by the canal company to the true owners, if capable of being identified; otherwise it was kept by the canal company:*

*Held, that in an indictment against a stranger for larceny of such iron, the property was properly laid in the canal company.*

CASE reserved by the Chairman of the Glamorganshire Court of Quarter Sessions.

At the Midsummer Quarter Sessions, 1858, William Rowe was indicted for stealing sixteen cwt. of iron, of the goods and chattels of the Company of Proprietors of the Glamorganshire Canal Navigation.

It appeared by the evidence that the iron had been taken from the canal by the prisoner, who was not in the employ of the Canal Company, while it was in the process of being cleaned.

The manager of the Canal stated that if the property found on such occasion in the Canal can be identified, it is returned to the owner. If it cannot, it is kept by the company.

It was objected that, as the Canal Company are not carriers, but only find a road for the conveyance of goods by private owners, the property was not properly laid as that of the Canal Company.

The prisoner was convicted and sentenced to two calendar months' imprisonment in the House of Correction at Cardiff, but was released on bail.

*Armory v. Delamirie* (1 Stra. 504; 1 Smith's L. C. 151).

No counsel appeared on either side.

POLLOCK, C.B.—The judges who have considered this case are of opinion that the conviction should be affirmed. The prisoner

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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was not in the employ of the Canal Company, but a stranger, and the property of the Company in the iron when it was in the canal, was of the same nature as that which a landlord has in goods left behind by a guest. Property so left is in the landlord's possession for the purpose of delivering it up to the true owner, and he has sufficient possession to maintain larceny against a stranger.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*February 5, 1859.*

(Before POLLOCK, C.B., WIGHTMAN, WILLIAMS, BYLES, and HILL, JJ.)

REG. v. BETTS. (a)

*Larceny—Master and servant—Sale of goods—Appropriation of proceeds—Embezzlement.*

*The prisoner (a miller's foreman at weekly wages) was bound in the course of his duty to enter sales in a double cheque-book, to give the customer a copy of the entry, and retain the counterfoil for his master's inspection, and to enter in a cash-book receipts and payments, immediately upon their being made. There was a settlement of these books and accounts with his master, every Saturday night. On two occasions the prisoner received orders for goods, which were delivered and the money received by him, and cheques given by the prisoner to the purchaser, not from the regular book, and no entries were made of the sales in the regular cheque-book or the cash-book :*

*Held, that, there having been complete sales of the goods, an indictment for larceny of them could not be sustained against the prisoner.*

**C**ASE reserved by the Chairman of the Kesteven Court of Quarter Sessions:—

Lincolnshire, Kesteven:—At the General Quarter Sessions of the peace of our sovereign lady the Queen, holden at Bourn, in and for the said parts and county, on Monday the 28th June, 1858, before the Right Hon. Sir John Trollope, Bart., chairman, William Parker, Esq., and other justices of the peace of our said lady the Queen, George Smith Betts was indicted, for that

(a) Reported by J. THOMSON, Esq., Barrister-at-Law.

he, on the 24th May, 1858, at Spittlegate, feloniously did steal, take and carry away twenty stones of sharps, of the goods and chattels of John Basker and another.

Upon the trial it was proved that the prosecutor and his brother were millers in partnership, having a mill at Spittlegate, and that the prisoner had for six months been in their employ, at weekly wages, as foreman at their mill, superintending the business by selling for them on credit, or for ready money, flour, sharps, &c., and that the prisoner was furnished with a printed double cheque-book (the cheque and counterfoil), and also with a cash-book; the former for entries to contain the name of the purchaser, the date of the purchase, the quantity purchased, and the price charged, a copy of which it was his duty to deliver with the goods to the purchaser at the time of sale, retaining the counterfoil in the book for the inspection of his master on settling his weekly account; and the latter (the cash-book) to contain an immediate entry and account of receipts and payments by the prisoner.

A settlement of these books and accounts between master and servant took place every Saturday night, when the books were produced and examined, and the balance paid over.

It was also proved (the result of suspicions and an inquiry) that Mary Moss, who kept a retail shop in Spittlegate, on Thursday the 20th May, 1858, gave the prisoner an order for eight stones of sharps, which were delivered on the same day, by John Cook the waggoner in the employ of the prosecutors, without a cheque having been delivered at the same time, Cook having asked the prisoner for such cheque, and received for answer that he (the prisoner) would take the cheque himself, and that Mrs. Moss would pay him; and the price, 8s., was paid by Mrs. Moss to the prisoner on the following Saturday morning.

It was also proved that again on Monday the 24th May, Mrs. Moss gave the prisoner another order for twelve stones of sharps, which were delivered on the same day, and paid for on the following Saturday morning by Mrs. Moss to the prisoner.

Upon each occasion the sharps were weighed by the prisoner in the presence of John Cook, the waggoner, a servant in the employ of the prosecutors, placed in sacks belonging to the prosecutors, and on the first occasion conveyed by Cook in prosecutors' waggon to Moss's house, where the same were shot into a bin by him (Cook); and on the second occasion the prisoner accompanied Cook with the prosecutors' waggon to Moss's house, and took the sharps out of the waggon and shot them into the bin.

The prisoner delivered cheques to Moss in the course of each day of the delivery of the goods, and on payment being made gave a receipt at the foot of the cheque, but the cheques so delivered, and although belonging to the prosecutors and precisely similar, were not taken from the regular cheque-book in use.

There was not any entry either in the cheque-book or the cash-book of the sale of the sharps, or payment of the money. The

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first sale and payment ought to have appeared in the accounts delivered by the prisoner on Saturday the 22nd May, and the second sale and payment in the accounts delivered on Saturday the 29th May.

For stealing these eight stones, and twelve stones, making together the twenty stones of sharps, the prisoner was apprehended, committed, tried, and convicted.

Upon the verdict of guilty being pronounced, the prisoner's counsel asked the justices to grant a case for the Court of Criminal Appeal, on the point whether the prisoner was, upon the facts proved legally guilty of larceny, and the indictment sustainable. Thereupon the court granted the application, and postponed judgment on the conviction, and discharged the prisoner on recognizance of bail to appear and receive judgment.

The opinion of this Court is therefore respectfully requested.

No counsel appeared on either side.

*Cur. adv. vult.*

POLLOCK, C.B.—The court is of opinion that this conviction should be quashed. Instead of indicting the prisoner for embezzling the money received by him, for the goods delivered to a customer upon his orders, the prisoner has been indicted for stealing the goods. He omitted to make the entries in the books, which it was his duty to make, of the sale, and by omitting to give his master credit for the proceeds of the sale, he concealed the sale from his master. As between the buyer and the prisoner's master, there had been an actual sale; and what the prisoner had done, which was objectionable, was not the selling of the goods, but appropriating the money, instead of making the proper entries and handing the money over to his master. The court are all of opinion that in so doing he has not been guilty of stealing the goods.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*February 5, 1859.*

(Before CAMPBELL, C.J., COCKBURN, C.J., POLLOCK, C.B., WIGHTMAN, J., WILLIAMS, J., MARTIN, B., CROMPTON, J., CROWDER, J., WILLES, J., BRAMWELL, B., WATSON, B., CHANNELL, B., BYLES, J., and HILL, J.)

REG. v. SKEEN AND FREEMAN. (a)

5 & 6 Vict. c. 39, s. 6—*Embezzlement by factors—Disclosure—Pleading.*

*The defendants were indicted under the 5 & 6 Vict. c. 39, s. 6, for having fraudulently and without the authority of their principals transferred and delivered a bill of lading of certain timber for their own benefit. At the close of the case for the prosecution, an examination of the defendants in the Court of Bankruptcy on the 26th of July, taken after their committal for trial on the present charge, was given in evidence on their behalf, and it was proved that such examination was compulsorily taken upon a summons duly issued by the Commissioner of Bankruptcy, at the instigation of the creditors. On the examination the defendants, in answer to questions put to them, gave a full detail of all the circumstances connected with the fraud alleged, and their evidence was substantially an admission of what had been deposed to against them on the hearing of the charge before the magistrate. It was contended on behalf of the defendants at the trial that the evidence given by them in the Court of Bankruptcy was a "disclosure" within the meaning of the proviso in the section of the statute above mentioned. Held, 1st. That if this was a good defence, it was properly raised under the plea of not guilty.*

*2ndly., per Campbell, C.J., Pollock, C.B., Wightman, J., Martin, B., Willes, J., Bramwell, B., Watson, B., Channell, B., and Hill, J., that the evidence given before the Commissioner of Bankruptcy was not a "disclosure" within the meaning of the said proviso, all the facts having been well known before that time. Per Cockburn, C.J., Williams, J., Crompton, J., Crowder, J., and Byles, J., that such evidence was a "disclosure" within the meaning of the said proviso, and furnished a good defence to the indictment.*

**T**HE defendants were tried and committed at the October Session of the Central Criminal Court before Pollock, C.B., and the following case was reserved :—

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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Alfred Skeen and Archibald Freeman were tried before me at the October Sessions holden for the jurisdiction of the Central Criminal Court, upon an indictment, which charged them, that having been intrusted as brokers and agents with a bill of lading of a cargo of timber, they had, without the authority of their principals, and in violation of good faith, fraudulently transferred and delivered the bill of lading for their own benefit.

The indictment was framed upon the statute 5 & 6 Vict. c. 39, which in the section which creates the offence contains the following proviso: "provided that no agent shall be liable to be convicted by any evidence whatsoever in respect of any act done by him if he shall at any time previously to his being indicted for such offence have disclosed the same in any examination or deposition before any Commissioner of Bankruptcy." The prisoners pleaded not guilty, and at the close of the evidence for the Crown, their counsel tendered the examination in writing of each of them, taken before the commissioner under a fiat duly issued. The counsel for the Crown objected that under the plea of not guilty those examinations were not admissible. I admitted the evidence, but reserved the points arising upon it; and the examinations were put in and read, of which copies accompany the case, and also copies of the depositions before the magistrates upon which the prisoners were committed for trial, and a copy of the evidence before me accompany this case. The prisoners were committed for trial on the 13th of July. The examination of the prisoners before the Commissioner of Bankruptcy, took place on the 26th of July, subsequent to their committal, but before the indictment was preferred. I left the facts to the jury, excluding from their consideration the examination before the commissioner, the effect of which I thought was matter of law, and reserved it accordingly. The jury found the prisoners guilty, and I have to request the opinion of the Court of Criminal Appeal—

First, whether the written examinations of the prisoners were admissible under the plea of not guilty.

Secondly, whether those examinations were such a disclosure of the offence of the prisoners within the meaning of the proviso above quoted, as, under the circumstances of the case, rendered them not liable to be convicted. Judgment is respite on the said indictment, the prisoners having been admitted to bail.

FRED. POLLOCK.

The following are the depositions before the magistrate referred to in the case:—

This deponent, the said Edward Ballard, on his oath saith as follows:—

I live at 38, St. Paul's-terrace, Canonbury. I am shipping clerk to James Cavan and others, of 29, Finsbury-circus, West India merchants. I attend to the shipping department, and have the authority to indorse by procuration bills of lading. In the



month of April last we had advice of a consignment of timber by a ship called the *Glide*; the defendants carried on the business of timber brokers, in Broad-street; they were the brokers employed by our firm to sell timber. On receiving advice I gave the defendants a specification of the timber to sell for arrival if the proper price could be obtained. I left the specification in the defendants' office, with a clerk, and I afterwards saw both the defendants, and had a conversation with them on the subject of the timber. They both said that they had not obtained a sufficient price to induce them to sell the timber. On the 24th of May last a clerk from the defendants, whom I believe to be Joshua Freeman, now present, called on me; he applied on the part of the defendants for the bill of lading, and in consequence of what he represented to me I gave him the bill of lading relating to 153 logs of greenheart timber by the "*Glide*." The bill of lading was not indorsed when I gave it to him; he went away and took it with him; in about half an hour afterwards he brought back the bill of lading, and he made a further representation to me, and in consequence of what he then said I endorsed the bill of lading and gave it him. I heard no more of this matter till the 28th of June, and in consequence of information I received about the bill of lading I went to the dock-house the following day. The bill of lading produced by Mr. Haywood is the one I gave to the defendant's clerk; it is now endorsed:—"Deliver to Mr. John Scott or order.—Skeen and Freeman." Mr. John Scott is the security clerk of the City Bank. The defendants had no lien on the bill of lading; they had not made any advance to us upon it.

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And this deponent, the said Joshua Charles Freeman, on his oath saith as follows:—

I live at 5, Bath-villas, De Beauvoir-road, Kingsland. I am clerk to the defendants. I am nineteen years of age. I am the nephew of the defendant, Freeman. I went to the counting-house of Messrs. Cavan & Co., and saw the last witness, Mr. Ballard, and obtained from him the bill of lading produced. I was requested by my employers to apply for it. Mr. Freeman requested me. The City Bank, at that time, held securities of our own for advances made to my employers. Some of those securities refer to goods brought by the ship "*Laura Campbell*." It became necessary to deliver some of those goods. It was mentioned to Mr. Freeman that there was a necessity to deliver those goods. About the time, either before or after I applied for the bill of lading, there was a conversation as to the necessity of delivering the goods brought by the "*Laura Campbell*." Mr. Freeman desired me to apply for that bill of lading. I think it was on the day I first made application for the bill of lading. Mr. Skeen was not then present when that direction was given to me. I had had no conversation with Mr. Skeen about the bill of lading up to the time I had orders from Mr. Freeman to apply for it. This conversation took place at Mr. Freeman's house; he was then at home ill. When Mr. Freeman

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desired me to get the bill of lading, he did not give me any specific directions what to do with it. I obtained the bill of lading on my first application, from Mr. Ballard; it was at that time unendorsed. When I first got the bill of lading I took it to the defendant's counting-house; my uncle was then at home. I did not see Mr. Skeen between the time I returned with the bill of lading to the counting-house and the time I went the second time for it. I went a second time, and obtained an indorsement on the bill of lading. I did this by no particular directions that I remember. When I took the bill of lading to the counting-house I then observed it was unendorsed, and, knowing that the bill of lading was totally useless without being indorsed, I took it back. It was necessary to have the bill of lading indorsed preparatory to its being lodged at the dock-house. It is not necessary for the purpose of obtaining a purchaser for the timber that the bill of lading should be indorsed. I obtained the indorsement from Mr. Ballard, and, having obtained it, I put it into our cashbox. Neither Mr. Skeen nor Mr. Freeman was present when I put it into the cashbox. The next day I took the bill of lading to my uncle; I went to my uncle on other business, and he desired me to bring the bill of lading. I went back and got it, and Mr. Freeman wrote the indorsement on the following morning, two days after I got it. When I left it with him in the evening, I merely said, "Here is the bill of lading;" the following morning the defendant Freeman indorsed the bill of lading. Freeman merely wrote on the back of the bill of lading, "Skeen and Freeman;" the words, "Deliver to Mr. John Scott or order," were not on the bill of lading at the time Freeman indorsed the bill of lading. He stated it was a very awkward affair about the "Laura Campbell," as the people were clamorous for the delivery order of the "Laura Campbell." He then said, "Suppose I lodged this bill of lading temporarily, for a few days, at the City Bank, in lieu of the documents relating to the goods by the 'Laura Campbell;'" and he said, "I expect to be in receipt of funds to replace it." I had told Mr. Freeman that the people had been clamorous for their orders by the "Laura Campbell;" this was about a week before Mr. Freeman wrote a letter to Mr. White, the manager of the City Bank, and enclosed the bill of lading in the letter. It is the letter produced. The following is a copy of it:—

"Oakley-terrace, 25th May, 1858.

"Dear Sir,—Will you be kind enough to give the bearer the warrant for the cedar, per 'Laura Campbell,' and hold the enclosed bill of lading as security instead, until I see you. It is worth about 1,800*l.* at the least. When I get to the city, which I hoped to have done to-day, I shall do as I said: immediately see Messrs. O. G. & Co., with a view of removing all the loans from you.—Yours faithfully,

"H. FREEMAN.

"A. J. White, Esq."

O. G. & Co., mentioned in the letter, refer to Overend & Gurney.

I took the letter inclosing the bill of lading to the City Bank, on the 26th of May. I should say the letter is misdated. It is dated the 25th of May: it was the 26th of May. I saw Mr. White, and gave him the letter, which he opened in my presence. Mr. White kept the bill of lading.

J. CHAS. FREEMAN.

And this deponent, the said Augustus Jackson White, saith as follows:—

I live at 16, Roupell-park, Streatham. I am manager of the City Bank. The defendants had an account at our house. Our bank made them advances to nearly 10,000*l.*; we had dock-warrants and other securities against the advances. The value of the dock-warrants, including the bill of lading in question, was about 5,000*l.* At the time the defendants stopped payment, among the dock-warrants we had some relating to the "Laura Campbell." One of the warrants relating to the "Laura Campbell" referred to 264 logs of cedar. That warrant was lodged sometime before the 26th of May. I think that warrant was lodged with us about the latter end of last year. I knew the defendants as timber-brokers. I have no reason to believe they carried on any other business. The last witness brought me the letter produced: I think on the 26th of May last. The bill of lading produced was inclosed in the letter. I believe the words, "Deliver to Mr. John Scott or order," on the back of the bill of lading, to be in the handwriting of Mr. Scott, our security clerk. It was not written at the time I received the bill of lading from the last witness. I requested the defendants' clerk to call again in an hour. I am not sure the clerk called again, but I saw Mr. Skeen in the afternoon of the same day I had kept the bill of lading. I told Mr. Skeen that we could not part with the cedar by the "Laura Campbell," unless they would undertake to hand the proceeds to us, and then I should have no objection to take this bill of lading as a collateral security for our so doing. He pressed me to comply with his request, but I told him I could not deliver any of the cedar on any other terms; he, Mr. Skeen, merely offered the bill of lading as security, in the usual way. I do not remember that Mr. Skeen said the bill of lading would be sure to be redeemed. I do not remember Mr. Skeen saying that he was very averse to the transaction, for the bill of lading did not belong to them. After some discussion, this letter was prepared by Mr. Scott, and Mr. Skeen took it away with him, and the bill of lading also. He said he should not like to sign it until he had considered it, and he would take away the letter; and he did take the letter away, and the bill of lading also. He did not say he did not like the transaction, the bill was not theirs; but Mr. Skeen said to me, after the failure, that he was very sorry that the bill of lading was ever lodged with us. Mr. Skeen brought the letter produced back the following morning, accompanied by Mr. Freeman's nephew. The letter is signed, I believe, by Mr. Skeen. It is as follows:—

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"75, Old Broad-street, London, 26th May, 1858.

"A. J. White, Esq., Manager of the City Bank.

"Sir,—You hold a warrant for 264 logs of cedar, ex 'Laura Campbell;' of this we have sold { 155 S. & F. } logs, and require to deliver them. We shall, therefore, be obliged by your indorsing the warrant for delivery to us of the { 155 S. & F. } logs, and ordering a new warrant to be made out for the remainder of the parcel, in name of your security clerk. The proceeds of these 155 S. & F. } logs, say 1,277*l*, we engage to hand over to you, within one month from this date; and in consideration of your so doing, we hand you herewith, as additional collateral security, bill of lading for 153 logs greenheart, per 'Glide,' from Demerara, which you will please lodge at the dock office, and take out a prime warrant in the name of your clerk, Mr. Scott.—We remain, sir, your obedient servants,

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"The present value of the 153 logs greenheart, per 'Glide,' referred to above:—

"Say 195 loads at 9 <i>l</i> .	...	...	...	...	1,755
"Less freight charges	...	...	...	...	780

"Is ... .. £975"

The bill of lading was lodged at the docks the same day.

*Cross-examined.*—To the best of my knowledge Mr. Skeen took away the bill of lading with the letter: he left the bill of lading with us, asking us to deliver up the cedars by the "Laura Campbell." In the first instance the bill of lading came to us enclosed in a letter from Mr. Freeman. I am not quite certain that I gave back the bill of lading with the letter, but my impression is that I did. I will not undertake to swear that I did deliver back the bill of lading; my impression is that I did, but I am not quite sure about that. I think I had not seen Mr. Skeen on the subject of securities previously to this. Mr. Skeen called on us in consequence of our requiring this letter.

*Re-examined.*—This conversation took place in my room at the City Bank. I think our chief clerk was present at the time. I think the object of Mr. Skeen's calling was for an answer to the application.

A. J. WHITE.

And this deponent, the said C. R. C. Hayward, on his oath saith as follows:—I live at No. 2, Leo Cottage, Cowley-road, North Brixton. I am clerk in the East and West India Dock House, Billiter-square. I produce the bill of lading referring to 153 logs of greenheart timber, by the ship "Glide," from Demerara. It was lodged, with the present indorsement on it, on the 26th of May last.

E. R. C. HAYWARD.

The defendants, having received the usual caution:—

The defendant Skeen stated he wished the following paper read:—

"I did not deposit the bill of lading at the City Bank. Nor did I authorize any person to deposit it. Nor was I aware it had been deposited till some time after the City Bank had got it in their possession. Whatever I did afterwards was done solely with the object of restoring it to Messrs. Cavan, Brothers."

The statement having been read, the said Alfred Skeen further says:—

I wish to add:—Mr. White is in error in stating that the bill of lading was sent with the letter. I had never seen that bill of lading anywhere till five minutes ago. I refer to the letter which Mr. White says the bill of lading was sent with to the office. I never saw that bill of lading till I saw it here to day. I never saw the bill of lading at all. Mr. White did not give me back the bill of lading when he gave me the letter of the 26th of May.

ALFRED SKEEN, July 13th, 1858.

And the said Archibald Freeman saith as follows:—

I leave it to my solicitor.

The following are the examinations in bankruptcy referred to in the case:—

Archibald Freeman, the above-named bankrupt, on his solemn declaration, saith:—

I have been in partnership with the above-named Alfred Skeen about seven years as timber brokers, for the purchase and sale of timber on commission. The City Bank were our bankers for the last two years. Our business with that bank was of the ordinary description. They discounted our bills, and we drew cheques upon them in the ordinary way. We had no other account with the bank than a current account. We were in the habit of lodging dock warrants with our bankers as security for money advanced. I think this practice extended over the whole time of our keeping the account. Our books do not show what securities we lodged from time to time with the bank. They gave us no receipt for the securities so lodged, and there is no record, that I am aware of, to show what securities were so lodged from time to time. The bank was generally in advance to us. Upon each occasion when we made deposits with the bank there was an understanding between us and the bankers as to the amount to be placed to our credit; and this amount was calculated upon the estimated amount of the securities we lodged. Our account was not made up at the bank except half-yearly, viz., on the last day of June and the last day of December in each year. It appears from our pass-book that on the last day of June, 1857, there was a balance of 453*l.* 15*s.* 7*d.* to our credit. It would be impossible for me to state now what securities the bank then held from us, or how much the bank had then advanced upon the securities deposited. On each occasion when we deposited securities, the

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amount at which the securities were valued was placed to our credit as so much cash. On the morning of the 14th of August, 1857, the balance to our credit at the City Bank was about 2316*l.*; but I do not know what securities the bank held to cover that sum. On that day I lodged with the bank the dock warrants for the cedar by the "Laura Campbell," consisting of 295 logs. We estimated the value for the purposes of loan at 2000*l.*, and the bank on that day gave us credit for 2000*l.* Subsequently to this transaction, we made many other deposits with the bankers from time to time, lodging with them various securities, and taking up from time to time the securities previously lodged. The bank kept a loan account with us; but I have never seen this account, and they have not furnished us with any copy. We kept a loan account in our ledger; but it does not distinguish between the loans we had from the bank and other parties, though, upon reference to other books, such as the journal and cash-book, the amounts received from the bank on any particular day can be ascertained; but, as already stated, there was no specification of the securities lodged. The dock warrant of the "Laura Campbell," on the 14th August, 1857, when it was lodged by us with the City Bank, was the property of Mr Edwin Skeen, a brother of my partner. The timber represented by that dock warrant was imported by Barnard, Hall, and Company, of Liverpool; and they forwarded us the bill of lading, with instructions for sale, at the end of July or the beginning of August, 1857. We sold the cedar to Edwin Skeen on the 25th August, 1857, for 2321*l.* 1*s.* 6*d.*, taking his acceptances at six months in payment of the amount. We negotiated these acceptances in the ordinary course of business; but we did not hand the warrants for the cedar to Mr. Skeen, but held them as security. On the 8th of September, by the direction of Edwin Skeen, we sold at a public sale 19 of the logs of cedar included in the 295 already referred to. I cannot state who the purchaser or purchasers were; we were ourselves the sellers. About the same time there were 8 logs delivered to Mr Skeen for his own private use; and I went to the bank and obtained the delivery order for 27 logs, and got a new warrant for the remainder, namely, 268 logs. That fresh warrant was lodged at the City Bank immediately after it was drawn up; but we have no record of the particular day on which it was so lodged. There was no further transaction in respect of the cedar until the 30th March, 1858, when we sold the 268 logs for Mr Skeen, on his account and by his direction. The sale was by private contract to Mr Charles Hoar. Skeen's acceptances were due before the last-mentioned date; but they had been returned by us, and renewed. Mr Hoar purchased the 268 logs for 1868*l.* 12*s.* 3*d.*, for which we took his acceptances at four months, which were discounted with Overend, Gurney, and Co. on the 8th June, 1858, and the amount of the discount went to our credit. The warrant remained with the bank until the 12th of May; on that day we sold 156 logs of the cedar on account, and by the direction of

Mr Hoar. I know from our books and from the information of others that we received the dock warrant from the City Bank, but I did not myself personally attend to any business from about the 20th of April to the end of June. I was not at home when Messrs Cavan, Brothers, and Co. sent us a specification of the timber on its way from Demerara by the ship "Glide." I was then at Liverpool; and Mr. Ballard, who represents Messrs. Cavan, Brothers, having written us the note which I now produce, and which is marked with the letter A., that note was forwarded to me at Liverpool, and received by me on or about the 23rd April. The ship did not arrive until the month of May, and I was then at home ill. After the ship arrived, my nephew, Mr Joshua Freeman, applied for the bill of lading, but I am unable to state upon what day. My nephew, in calling on me at my private house, said, "The 'Glide' is arrived; shall I call for the bill of lading?" or words to that effect; and I said, "Yes." I gave no directions what was to be done with the bill of lading. On or about the 25th of May my nephew mentioned that the buyers of the logs per the "Laura Campbell" were in want of the goods; but I don't remember anything further passing between him and me on that day. On the same day that my nephew brought me the bill of lading which had been received from Cavan, Brothers, I enclosed it in a private note to Mr White, the manager of the City Bank. This note was written in the parlour of my private house, and I believe in the presence of my nephew. I kept no copy of it. I believe I told Mr. White in this note that he would oblige me by handing my nephew the warrant for the 264 logs of cedar by the "Laura Campbell," and by his holding the bill of lading per "Glide" for three or four days, until he saw me. I was not able to see Mr. White for several days; but I understood, before I did see him, that he had delivered the warrant for the logs of cedar to my nephew. I had nothing further to do with the transaction in any way; but my nephew told me that Mr. White had declined to deliver the warrant for the logs of cedar on my private note, and required the order of the firm, which had been sent. I have no recollection of ever having signed any agreement with the bank, and I do not remember any instance of any payment in satisfaction of a specific loan. I am unable to give any explanation of the entries in my banker's pass-books, debiting agreement stamps. I do not believe that the 2000*l.* advanced by the bank on the warrant for the 264 logs by the "Laura Campbell" was specifically paid off; but after that advance was made, sums to a much larger amount were credited to us by the bank. It appears by my banker's book, under date 28th November, 1857, that there was a loan of 11,950*l.* by the bank, and that I was credited on that day with the same sum of 11,950*l.*, as repaid. I am totally unable myself to explain these entries of the transaction to which they refer; but I have no doubt our clerk, Mr. Mendham, can explain. A. FREEMAN.

Edward Goulburn, Commissioner.

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Alfred Skeen, the above-named bankrupt, on his solemn declaration saith:—

That I have been in partnership for about seven years with the above-named Archibald Freeman. I took the out-door part of the business at the docks, and left the financial and book-keeping department to my partner. I was never in the habit of transacting any business with our bankers. In the month of May last my partner was absent from business at his home. I did not know at that time what securities were deposited with the City Bank. Two or three days before the 26th May our book-keeper mentioned to me that he thought it would be advisable I should go over to the bank and see Mr. White, the manager, and see how our accounts stood with the bank. I began at this time for the first time to doubt whether we could meet our engagements. I went over to Mr. White, and asked him how we stood; he told me that the bank had certain securities, and that we owed them a large balance, for which they held those securities. Mr. White had a memorandum, containing, as I understood, a list of the securities; but he did not give it to me, or give me, in fact, any document or figures in writing. He asked me my opinion as to the value of various securities on which specific advances had been made. I think it was at this interview that he told me that my partner had made an application to him (Mr. White) for the release of the "Laura Campbell" cargo; but I think this was all he said on the subject. I do not believe that at the time this interview took place the bill of lading per "Glide" had come into the hands of Mr. White. The impression which this interview left on my mind was, that the bank was more than covered by the securities held by it. I heard nothing more until the 26th of May, when Mr. Joshua Freeman, my partner's nephew, informed me that the cedar per "Laura Campbell" was free for delivery, for he had deposited the bill of lading per "Glide" with the bank, and Mr. White had agreed to give up the warrant for the cedar upon that deposit. I was much annoyed by this announcement, and told Mr. Joshua Freeman that if the bill of lading was not restored to Messrs. Cavan within half an hour, I would inform them of the transaction. Joshua Freeman observed in reply that his uncle had only lodged the bill of lading for a day or two, when it would be redeemed by money to be obtained from Overend, Gurney, and Co. by discounts. I had previously learned myself at the docks that the purchasers of the cedar were anxious and pressing for the delivery of their timber. Mr. Joshua Freeman also told me that Mr. White wished to see me at the City Bank, and I went there with Joshua Freeman. We were introduced into Mr. White's private room; and he told me that my partner had lodged the "Glide's" bill of lading with the bank, and that upon my signing a letter which he produced already written, he would deliver up the dock warrant for the "Laura Campbell's" cedar. I read the letter, and excused myself from signing it at that time, and took it with me. I said nothing further at that



time about the "Glide's" bill of lading. On the following morning I signed the letter, and either took or forwarded it to the bank. I did this, fearing that Cavan and Co. would come to a knowledge of the transaction, and believing the assurance of my partner's nephew that the bill of lading would be redeemed in the course of a day or two by my partner. I did not receive the warrant myself for the cedar, but left it to Joshua Freeman to arrange that transaction. Some days afterwards, on a Saturday, about five o'clock, I was sent to from the bank, and again saw Mr. White; this was previously to our having stopped payment. Mr. White asked me if we could pay any money against the bank advances. I told him I could not do so at that time; but I added that I was most anxious for the release of the "Glide's" bill of lading, as we had made no advances upon it, and that Cavan, Brothers, even paid their own freight, and that the bill of lading ought never to have been lodged. I do not remember that Mr. White made any remark on this. Before I made this communication to Mr. White, the warrant for the cedar per the "Laura Campbell" had been delivered to us. The delivery to the purchasers of the timber was an office arrangement. The transaction above referred to is the only one I had with our bankers. I never saw the bill of lading of the timber ex "Glide" until it was produced by Mr. White at the justice-room, Guildhall, on Tuesday, the 13th July instant.

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*Ballantine*, Serjt. (*Robinson* with him), for the defendant Skeen. —I contend that this is a sufficient disclosure under the 5 & 6 Vict. c. 39, s. 6, to prevent the defendants from being convicted. The words of the statute are—[reads them.] Now, here the defendant has, previously to his being indicted for the offence, disclosed such act on oath, in consequence of a compulsory process of a court of law, in a suit *bona fide* instituted against him. As yet there has been no judicial decision on the point; for, although in *R. v. Strahan and Paul* it was raised, it became eventually unnecessary to decide it, as the defendants there were convicted on a charge in which no disclosure of any kind had taken place. One point raised here is, whether the defence was properly raised under the plea of not guilty; but I submit that in no other way could it be set up. [POLLOCK, C.B.—You need not trouble yourself upon that point, as I believe we are all agreed that, if the defence is available at all, it must have been taken under the plea of not guilty.] Then, if this is not a disclosure, it is difficult to see what is one. If a sufficient disclosure has been made, it is immaterial under what circumstances it took place. It is true that, a few days before the examination in bankruptcy, there had been an investigation before the magistrates, the depositions before whom are annexed to the case; and it may be conceded that, substantially, the examinations in bankruptcy, and the depositions, disclose the same facts. But the one proceeding is totally distinct

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from the other. The defendants were duly summoned to the Bankruptcy Court, and compelled to answer such questions as were put to them, and there disclosed what, in truth, amounted to a confession of the facts alleged against them. [POLLOCK, C.B.—The question is, whether there has been any disclosure at all. If there had been nothing but a charge made, and no specific evidence given under it, then the statement of the defendants might have been sufficient. But all the circumstances had been before divulged; the defendants did not state any facts that were not known before. There was nothing to disclose, and therefore no disclosure. COCKBURN, C.J.—You seem to assume that there was a disclosure; but has the word “disclosure” the same meaning as “statement?” Lord CAMPBELL, C.J.—The word disclosure seems to be equivalent to discovery—a statement for the first time.] And this was the first time it was stated by the bankrupts—the first time it was stated in the Bankruptcy Court. The witnesses before the magistrate had only stated facts from which the guilt of the defendants might be inferred, and their statements might be untrue. It is a very different thing for the bankrupts themselves to confess their offence, and give a narrative of all the circumstances connected with it. The act of Parliament expressly says, that the bankrupt himself shall have immunity, if he shall have disclosed. Now, here *he* informs the world for the first time, and therefore discloses, even according to the adverse interpretation of the term. [Lord CAMPBELL, C.J.—But, at the very time that the examination takes place in bankruptcy, the bankrupt knows that he is in reality giving no information; for the witnesses before the magistrate were all examined in his presence. Suppose that the bankrupt were asked this question—Are the statements contained in the depositions all true? and he was to answer, Yes: would that be a disclosure within the act?] I contend that it would, if the question were put in the course of a compulsory examination by a court of competent jurisdiction. The act was passed to induce persons in the defendants’ position to make an early confession of their fraudulent practices, in order that the creditors might benefit by their statements, and the assets be augmented. [Lord CAMPBELL, C.J.—But what benefit could accrue from a statement of no more than was known already?] Who is to measure the amount of gain to be derived in such a case as this? It might be, that the statement of the facts by the bankrupts themselves would put the assignees in a very different position to what they would be in, supposing they were merely proved by the evidence of others. If this was, otherwise, a disclosure within the words of the act of Parliament, it would not fail to be one because no benefit was actually derived from it. Such statements are calculated to benefit the estate, and, therefore, the Legislature encouraged them, in all cases, without reference to results in any individual case. [POLLOCK, C.B.—The act of Parliament was passed to punish crime; and we can scarcely suppose that the Legislature would stultify itself so far as to

provide a punishment for an offence, and then enact what was equivalent to repealing the penalty. The interests of the public are certainly more important than the mere pecuniary rights of creditors.] The act, by its very terms, was certainly intended to give an immunity to delinquents in certain cases, and the question is, whether this is one of them. It is said that this is not a disclosure, because the facts were proved on an investigation before magistrates; but then, what is the species of publicity required to prevent a statement becoming a disclosure? Scarcely any fraud is ever committed without some person or persons being made acquainted with the facts. If the facts were known to a man's clerk, would that be sufficient to prevent him from availing himself of the statement of them on a compulsory examination in bankruptcy? Suppose there is a strong suspicion afloat that a bankrupt has committed a fraud, would a statement of the bankrupt, in confirmation of such suspicion, be available? If it would, that is very much the case here. For a *prima facie* case before a magistrate amounts to little more than a suspicion, until a conviction or a confession has taken place. [COCKBURN, C.J.—The statute certainly seems intended to induce bankrupts to come in at the earliest moment, and, by disclosing the way in which they have dealt with property, to give the assignees facilities for recovering it; and it is very difficult to see what tribunal is to decide upon whether, under the particular circumstances of each case, there has been a disclosure or not.] The intention of the act would be entirely defeated, if bankrupts were told that knowledge on the part of others would be sufficient to prevent their availing themselves of the protection otherwise afforded them. [LORD CAMPBELL, C.J.—We must put as reasonable a construction as we can upon what the Legislature has enacted, and it is very difficult to believe that the intention was, that a man, by publicly stating what was known before to all the world, should purchase for himself immunity for a great crime, undoubtedly committed. Nothing would be more easy, if the argument for the defendants is to be relied on, than for a friendly creditor to get a meeting appointed for the examination of the bankrupt, and then, with the mere object of protecting him, affording him an opportunity of making a statement of all the circumstances of the fraud. That would surely be to make the statute a dead letter.] There is no suspicion, here, of any collusion. Probably it may be conceded that, to render the disclosure effectual, it must be made *bona fide*; but it is not to be presumed that the creditors would associate themselves with the bankrupt for the purpose of enabling him to escape the penalty of his frauds, and there is no pretence for suggesting it here. The bankrupts were regularly summoned by the very creditors who were prosecuting them; the questions put were put adversely, and the defendants were compellable to answer.

*Giffard*, for the defendant Freeman.—The word disclose can have but two meanings; one, the discovery of what was not known to any one before; the other, a statement of what might be known

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to some persons, but not to him to whom the information was, at the particular time, given. Admitting that these facts were known to some persons before, still I submit that this was a disclosure within the meaning of the statute. If, because the information had been given to some person before, there was no disclosure, then where is the line to be drawn? Knowledge, on the part of one individual, would be quite as effectual, to prevent its operating as a disclosure, as knowledge possessed by a thousand. The fact of the previous knowledge having been imparted publicly in a court of justice cannot be taken into the account. What was stated in the Court of Bankruptcy was clearly a disclosure, but for what antecedently occurred; and if that is sufficient to defeat it, it cannot be because such knowledge was judicially obtained, in contradistinction to any other mode of acquiring it. The argument on the other side must go the length of contending that, if the facts were known before, whether publicly or privately—to one person or to a thousand—there was no disclosure, within the meaning of the act. But, surely, this would render the particular portion of the act under consideration totally inoperative. The facts may all be known to some one or more persons, or it may be that some facts are known to some and some to others, so that, in truth, they are all known to some person or other. A. may be acquainted with some, B. with others, C. with more. The bankrupt comes before the Commissioner, and gives a statement of them all. Is not this a disclosure by him of what was not known to any one person before? [LORD CAMPBELL, C.J.—But here each person has contributed his stock of information previously, and the whole is, therefore, henceforth known.] But not known in the sense in which the bankrupts' statement makes them known. The witnesses may not have spoken truly or accurately. Their statements are matter from which an inference may be drawn that the bankrupt has committed a fraud, but his examination comes in and gives a force and coherence to the whole. What was before only suspected, is now fully confessed. A jury might acquit on the depositions of the witnesses; they could not fail to convict on the defendants' statement, and why? because the knowledge imparted to them by the one and the other were totally different things. Again, the assignees are placed in a different situation. They might hesitate to take proceedings on the mere statement of the witnesses, whereas they would immediately act upon the confession of the defendant. This would be in consequence of the different species of knowledge they had gained by the one proceeding and the other. But I submit that the word disclose is to be taken, not only in its popular sense, but in the way in which it is used in legal phraseology. For instance, a defendant is said to disclose a defence on the merits to an action, although all the facts may have been known to very many persons. A plaintiff is said to disclose a cause of action in the declaration. Under the Bills of Exchange Act the defendant may be let in to defend on an affidavit disclosing a defence upon the merits, and in *Whiley v.*

*Wiley* (27 L. J. C. P. 305) it was held that such disclosure must let out the circumstances relied on as a defence. There the word "disclose" cannot have the restricted interpretation contended for on the other side. The Legislature appears to have been providing against the possibility of the new law interfering with the right of obtaining discovery in equity. Inasmuch as a person might refuse to answer matters which criminated himself, the provision under discussion was probably intended to disentitle a person against whom a bill in equity had been filed for discovery, to refuse to answer upon any such ground. Discovery and disclosure are, in this sense, identical; and it never can be contended that discovery means the confession of something previously unknown, inasmuch as the plaintiff in equity must positively aver that of which he seeks discovery. This statute has especial reference to factors and agents, and seems to make the punishment of the particular offence which it creates, subservient to the interests of the creditors and the estate. [CROMPTON, J.—That is what has struck me. The act seems to introduce a new species of crime. It makes factors and agents responsible, in a criminal way, for what was not previously indictable; and the Legislature may have thought that, as this was an experiment, they should be cautious, and give to the person misappropriating funds entrusted to him, some opportunity of escaping from the consequences of his conduct, if it might be done consistently with the benefit of the creditors. It seems to me very difficult to say how we are to apply the law, in ascertaining whether a given statement is a disclosure or not.] Just so. What is the tribunal for deciding whether what would otherwise be a disclosure is not one, in consequence of what has previously taken place; and what amount of difference between that which a bankrupt states in his examination, and any knowledge previously obtained, would have the same result?

## JUDGMENT.

LORD CAMPBELL, C.J.—On the 13th day of July, 1856, the two defendants were charged before a magistrate with the offence for which they were afterwards tried, under the 6th section of 5 & 6 Vict. c. 39. By the depositions of several witnesses on oath, the charge was then clearly proved against them, and all the circumstances connected with the guilty act imputed to them were fully explained; accordingly, they were duly committed for trial. On the 6th of July preceding they had been adjudged bankrupts; and on the 26th of the same month, while the prosecution was pending against them, being examined in the Court of Bankruptcy at the instance of a creditor, they made a statement to the same effect as the depositions before the magistrate, and amounting to a confession of their guilt. Very soon after, at the next meeting of the Central Criminal Court, an indictment for this offence was preferred and found against them. The trial coming on before the Lord Chief Baron, they pleaded not guilty; and they were convicted on exactly the same evidence which had been given against them before the magistrate. When the prosecutor's case

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was closed, their depositions in the Court of Bankruptcy were tendered in evidence in bar of the prosecution, under the proviso to the section of the statute upon which the indictment was framed. It was objected, on the part of the Crown, that these depositions could not be admitted as a defence under the plea of not guilty, and that, at any rate, they did not amount to any defence. The Lord Chief Baron admitted the depositions, intimated his opinion that they did not constitute a defence, and reserved these questions for the opinion of this court. If the depositions could be at all available, I think that they might have been admitted under the plea of not guilty, and that they were tendered in evidence at the proper time, when it could be distinctly seen what was the *corpus delicti* relied upon, and a comparison could be made between the depositions before the magistrate, the depositions in the Court of Bankruptcy, and the evidence adduced at the trial, so as to ascertain whether there had been a disclosure within the meaning of the proviso. But I am of opinion that the depositions did not entitle the defendants to an acquittal. This question depends upon the sense in which the word "disclose" is used in the proviso to the 6th section of this statute. If by "disclosing the act" is meant merely stating the guilty act and confessing it, whatever may be the previous state of knowledge of the creditors, or of the Commissioner of Bankruptcy, and whatever means of proving the guilty act may exist, and whatever steps may have been taken and may be pending for prosecuting and punishing the offender, and although the statement or confession may be made while the grand jury are hearing evidence in support of the indictment, this conviction ought to be quashed. But, according to Dr. Johnson, "disclose" may mean "to uncover; to produce from a state of latitancy to open view; to reveal; to impart what is secret." According to Richardson (whose authority I much respect) "disclose" is "to uncover, or discover; to reveal; to open; to make known; to tell that which has been kept concealed." Where by the use of clear and unequivocal language, capable only of one construction, anything is enacted by the Legislature, we must enforce it, although in our own opinion it may be absurd or mischievous. But if the language employed admit of two constructions, and according to one of them the enactment would be absurd and mischievous, and according to the other it would be reasonable and wholesome—we surely ought to put the latter construction upon it as that which the Legislature intended. Where an agent who has abused the confidence reposed in him, and fraudulently made away with property with which he was intrusted, reveals what was before unknown or incapable of proof, it may be well that, for the information and advantage obtained by his confession, he should be indemnified against the penal consequences of his misconduct, which without his confession could not have been proved. But can it be supposed that the Legislature intended wantonly to extend the indemnity to cases where there is no merit whatever in the accused, where he states

only what he knows to be already notorious, and where neither civil nor criminal justice can be at all advanced by the alleged disclosure? Would it not be a flagrant perversion of justice if a detected delinquent, of whose guilt there is abundant evidence, possibly by a previous voluntary confession, were enabled after the charge has been made and judicially proved, and when a bill of indictment has been prepared, and is to be preferred against him at the next meeting of the proper criminal court before which he can be tried, to procure a friendly creditor to summon him into the Court of Bankruptcy, and if, by there making or repeating the confession of his guilt, he might set his prosecutor at defiance, and escape with impunity? In the present case, when the defendants were examined in the Court of Bankruptcy, there was neither uncovering, nor discovering, nor revealing, nor imparting of what was secret, nor telling that which had been kept concealed. Neither for civil nor criminal purposes was the slightest advantage obtained by the alleged disclosure. Without it an action might have been maintained for the conversion of the bill of lading. Without making the slightest use of it, the defendants were actually convicted of the misdemeanor. A difficulty was presented by the counsel for the defendants, by supposing a case where the fraudulent agent, at the time of his examination in the Court of Bankruptcy, may have reason to think, and may believe, that he is disclosing what was before unknown, and may be deprived of his indemnity by proof of previous knowledge, and means of proof in the possession of others. If he really believed that he was making a discovery, and enabling his principal to obtain justice, I should be strongly inclined to think that this would be a disclosure of the fraudulent act within the meaning of the proviso. But in the present case the defendants, when examined in the Court of Bankruptcy, knew full well that they were making no discovery, for they were present before the magistrates when the depositions against them were taken; those depositions were all read over to them, when they were asked if they then wished to say anything in answer to the charge, and they must have been fully aware that their statement was only a repetition of what had been before sworn against them when they were committed for trial. It is highly proper, in construing this act of Parliament, that we should look to see in what sense the word "disclose" is used in other acts of Parliament; and we find it in 52 Geo. 3, c. 63, s. 5, and in 7 & 8 Geo. 4, c. 29, s. 52, both of which are *in pari materia*. The object seems to be the same in all the three, they having regard to a civil remedy, and to criminal proceedings in cases of breach of trust by agents; the language employed is nearly the same in all the three; and I am of opinion that in all the three, for the same reasons, the word "disclose," admitting of the same construction, requires the same construction to be put upon it. There having been no judicial decision upon the construction of these statutes, I do not see they can be of use to us, except to show more strongly how justice might be defeated by now holding

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that "disclosure" means confession of what the party confessing was well aware had been before made known, and had been before judicially proved. There is another set of statutes of a different description respecting bribery at Parliamentary elections, in which the word "disclose" is to be found, the most recent of which is 15 & 16 Vict. c. 57. By section 9 of this statute, "no person shall be excused from answering any question on the ground of privilege, or on the ground that the answer to such question will tend to criminate such person;" and in return it is enacted in the most express terms that "every person who is examined as a witness, and gives evidence touching such corrupt practice, and who upon his examination makes a true discovery to the best of his knowledge touching all things to which he is examined, shall be freed from all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions to which he may have been or may become liable for anything done by such person in respect of such corrupt practice." Here it is quite clear that the most ample indemnity is held out to the person so examined if he makes a true answer to all the questions put to him, whether the facts he so states were before known or not. Section 10 goes on to enact that the person so examined shall not be indemnified without a certificate from the commissioners, "stating that such witness has upon his examination made a true disclosure touching all things to which he has been so examined." But true disclosure here evidently means true statement; and the certificate required by the 10th section is merely that the witness has conformed to the duty cast upon him by the 9th section when examined upon the *voir dire*. The other statutes of this class admit of the same explanation; and the laudable objects of the Legislature in enacting them seem to be promoted by construing "disclosure," where used in those statutes, to mean "statement;" but to give the word "disclosure" the same meaning in the statute 5 & 6 Vict. c. 39, which treats of a totally different subject, I think would be to contravene the intention of the Legislature, and to occasion great public mischief. For these reasons I am of opinion that in the present case there was no disclosure within the meaning of the proviso relied upon, and that the conviction ought to be affirmed. This is a judgment in which my Lord Chief Baron, my brothers Wightman, Martin, Willes, Bramwell, Watson, Channell, and Hill, concur.

COCKBURN, C.J.—In common with my learned brothers, Williams, Crompton, Crowder, and Byles, I am unable to concur in the judgment just pronounced by my Lord Campbell, on behalf of himself and the majority of the Court. I am of opinion that the defendants were entitled to be acquitted, as having disclosed on oath, on an examination before a Commissioner in Bankruptcy, within the meaning of the protecting proviso of the 5 & 6 Vict. c. 39, the matter for which they stood indicted as an offence against that statute. It is true, no doubt, that the transaction upon which the charge arose had not only become known, but had, indeed,



become the subject-matter of prosecution, though not of indictment, against them at the time their evidence was given. On the other hand, it must be taken that the evidence was given on a compulsory examination, instituted *bona fide*, with a view to the interests of the creditors, and not to the protection of the defendants. I am of opinion that evidence given under the latter circumstances constitutes a "disclosure," within the meaning of the statute, and entitles the party giving it to the promised immunity, notwithstanding that publicity may have been previously given to the transaction, or that a prosecution may even have been commenced if it has not advanced as far as indictment. In the consideration of this subject two questions appear to present themselves, *first*, whether the term "disclose" necessarily imports, *ex vi termini*, a particular meaning; *secondly*, if it does not, what meaning, upon a review of the statute in question, and of others of a like nature, we ought to attach to it. On the first point we are told, on the authority of lexicographers, that the proper and general signification of the word "disclose" implies that the subject-matter of the communication is previously unknown; and that such, therefore, must be presumed to be the sense in which the term has been used in this statute. It may, I think, be admitted that such is the more ordinary meaning of the term; but, on the other hand, it is equally certain that the word is, in numerous instances, used simply in the sense of to "show," to "set forth," to "state or declare," without the collateral idea of the subject-matter of the communication being before unknown. And it is important to observe that this is peculiarly the case in legal phraseology. In professional language the term is generally—I had almost said, and I believe I should be justified in saying, uniformly—so used. Thus we say, in common legal parlance, that a declaration discloses no cause of action, a plea no ground of defence, an affidavit no defence on the merits: in all which cases it is clear that the term is used in the more restricted sense contended for on behalf of the defendants. In one view, indeed, it may be said that this use of the word is not inconsistent with the more extensive meaning; for even in this sense a thing may be said to be "disclosed," if it is made known for the first time as between the parties to the communication. A thing is not the less disclosed to A. if made known to him for the first time, because it has been previously known to B. and C. Thus, it would be perfectly appropriate language to say to A., "I have discovered such and such a circumstance affecting the interest of B. and C. I shall disclose it first to B., and then to C." So, that which is for the first time stated or made known in the course of a judicial proceeding, may well be said to be disclosed to the court, though it may have been known before to fifty persons elsewhere. In like manner, the same term is applied in various acts of Parliament relating to the law—as in the 27th section of the Common Law Procedure Act of 1852, relative to setting aside a judgment signed against a defendant on an affidavit "disclosing a defence on the merits;" and again, in the

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Bills of Exchange Act, 18 & 19 Vict. c. 67, s. 2, where there is a provision in the same terms as to a defendant being let in to defend. And so restrictive was the construction which some judges were disposed to put on this term, that in a case which arose on the first of these statutes, *Warrington v. Leake* (11 Exch. 304), a majority of the Court of Exchequer decided that an affidavit in which a defendant simply stated that he had a defence on the merits, was a sufficient disclosure of such a defence to satisfy the statute. And I have the authority of the Lord Chief Baron, certainly no mean authority in matters of language, for saying that “the Legislature has made use of a word which does not necessarily convey more than the sense of telling.” Still more strikingly to the purpose is the use of this term in a series of statutes (to which I shall have occasion to refer more particularly further on), statutes of a cognate character to the one we are considering, inasmuch, as, like the present, they afforded immunity to offenders as the price of the disclosure of crime. So far, therefore, as respects etymological authority, as derived from the legal sense and use of the term, it appears to me to be entirely in favour of the defendants. With regard to the construction of the statute, if I apprehend the argument aright, it is said, *first*, that the abuses which would arise from examination before commissioners in bankruptcy being instituted by friendly creditors for the frustration of criminal justice, if offenders about to be prosecuted could be thus protected, are sufficient to show that the statutory protection could only apply to acts previously known to the offender alone, and by him for the first time revealed on his examination; *secondly*, that the Legislature could not have intended to afford immunity in respect of acts already known, and in respect of which prosecution and punishment were impending, so as to snatch, as it were, a criminal from the hands of justice. As regards the first argument, *ab inconvenienti*, I shall presently show that the inconvenience apprehended would be far outweighed by difficulties of a still graver character arising from the opposite construction; but I must, in the first place, point out that the argument derived from this source is altogether inadmissible, for the statute we are now to expound is but one of a series of statutes passed *in pari materia*, in all of which this same protecting clause occurs, and in all of which the term “disclose” must have the same construction; but, in the earlier statute, the clause did not apply to evidence given before bankrupt commissioners at all. And if, as I shall presently endeavour to show, the term “disclose,” as used in the first and leading statute, had no reference to the novelty of the matter deposed to, it is too plain to be disputed that no argument derived from inconveniences which may arise from the extension of the provision to examinations in bankruptcy can be admitted to vary the sense of the term, as used in a provision common to both statutes. As regards the second part of the argument, it is, no doubt, a striking and a popular view of this statutory protection, to say that it cannot have been intended that an opportunity of escaping should be afforded

to offenders whose delinquencies have been already brought to light, simply because the parties aggrieved might find it desirable, for the protection of their private interests, to resort to the testimony of the guilty parties. I myself was at first greatly struck by this view, but on a more careful and attentive survey of the acts of Parliament, I have become persuaded that such view is erroneous. Some confusion appears to me to have arisen from considering the 5 & 6 Vict. c. 39, as an isolated statute, whereas, in fact, it is only one of a series of legislative enactments relating to fraudulent embezzlements by bankers and agents, in all of which the same protecting clause occurs. To a due appreciation of the subject it becomes necessary to pass these statutes in review. The first of these statutes was the 52 Geo. 3, c. 63, which for the first time made the embezzlement of securities by bankers, brokers, or other agents, an offence. Now, when this statute is attentively considered, it appears to me plain that the protecting clause was inserted for no other purpose than to enable the aggrieved party to obtain the full effect of those civil remedies, which, while it converted into an offence that which at the common law was only a fraud, the statute was most careful to secure to him. After creating the offence, the act goes on to provide that any remedy which the party aggrieved might have had at law or equity shall not be impaired; and then immediately follows a proviso (as in the present statute) for protection to the offender as to any act "disclosed" by him on oath, "under or in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding in or to which he shall have been a party, *bona fide* instituted by the party aggrieved." For this act was afterwards substituted the 7 & 8 Geo. 4, c. 29, which first provided for the case of factors pledging for their own use goods, or documents relating to goods, entrusted to them for sale. Here again occurs the protecting clause, but with two striking improvements on the corresponding clause of the preceding statute: *first*, in the omission of the provision that the suit or proceeding in which the evidence is given should be one to which the offender was a party, whereby the evidence of the delinquent was secured in cases in which, by fraud or collusion with the guilty agent, the securities or goods had got into the hands of third parties; and, *secondly*, by the extension, for the first time, of the protection to acts of which evidence was given before commissioners in bankruptcy. This statute again was followed by the 5 & 6 Vict., the act which we are now called upon to interpret, in which the protecting clause is in precisely the same terms as in 7 & 8 Geo. 4. From this review of these acts of Parliament, it seems to me, two consequences necessarily follow: *first*, that these acts being *in pari materia*, and the proviso the same in them all, whatever was the meaning of the term "disclose" in the first, such must be its meaning in the last; and, *secondly*, as already pointed out, that if, upon a closer consideration of the first of these statutes, the meaning should prove to be the narrower one, all the arguments *ab inconvenienti* derived from the supposed con-

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sequences arising upon examinations in bankruptcy, must fall to the ground, seeing that the proviso of the first statute does not relate to disclosures made on examinations in bankruptcy at all. Now, as regards the first question, it appears to me only necessary to look at the provisions of the 52 Geo. 3, to see at once that the word "disclosed," as there used, imports no more than a full statement by the witness of the matter in question. The Legislature, while it created the offence, seems to have intended to leave to the aggrieved party the option of proceeding criminally against the wrongdoer, or of enforcing his civil remedies against him. It was evidently most anxious to preserve to the injured party all his civil remedies intact. It even went out of its way to enact unnecessarily (the offence created being only a misdemeanor), that the civil right and redress of the aggrieved party should not be merged in the offence. And inasmuch as the efficacy of the civil remedy would, in many instances, materially depend on the admission on oath of the offender, and as, in consequence of the matter now being made penal, the offender would be entitled to refuse to answer, on the ground of his being privileged from criminating himself, the statute immediately went on to provide for the immunity of the respondent, thereby taking away, in effect, the privilege of silence, and securing the evidence to the aggrieved party. The succeeding statute removed the condition that the evidence should have been given in an action or suit to which the offender was a party; doubtless because it was found, as the fact is, that in the majority of instances the cases in which the evidence of the offender is required, are those in which he is not a party to the suit; and doubtless for the purpose of securing the evidence in that numerous class of cases in which securities, goods, or documents may have got into the hands of third parties acting in concert and collusion with fraudulent agents or bailees. In like manner the protection was extended to examinations in bankruptcy, in order that bankrupts who had committed offences of this nature, and agents who had embezzled the securities or goods of persons becoming bankrupt, might be subjected, for the benefit of a bankrupt's creditors, to the useful and searching ordeal of examination before commissioners in bankruptcy. It appears, therefore, to me, clear that the purpose of these protecting clauses was, as I have explained, to secure, to the parties interested, the evidence of the delinquents, by taking away the ground on which alone the privilege of silence could be claimed. At all events, the only alternative that can be suggested is, that the object was to induce the offender to give evidence of the guilty transaction in the civil proceeding (evidence which, on the hypothesis, he was not otherwise bound to give), by insuring to him, as its price, protection against the possibility of prosecution and punishment. In any view of the subject, the object of the provision can have had reference to civil proceedings alone. It can have had none to the position of the offender, simply as such. It never can have been intended to give immunity to the offender, in respect of acts which

it was the very object of the statute to visit with punishment, and solely for the purpose of obtaining a useless confession of his guilt. And, indeed, I do not apprehend that it can be for a moment asserted that a spontaneous revelation of the act by the delinquent would give him the benefit of the protection of the statute, because it may be that it would then be given to a man who had voluntarily given an explanation, for the purpose of ensuring protection, by a revelation which he would not otherwise have given. A review, therefore, of all this legislation seems clearly to establish that the purpose of the protection was simply to insure to the aggrieved party the admission or evidence of the delinquent in civil proceedings. But if this be so, it is plain that the prior knowledge or publicity of the facts elsewhere could have no bearing on the subject. It would avail the party requiring the evidence nothing that the transaction had been disclosed before. Yet, if such prior disclosure were to operate as a bar to the protection, the obligation or the inducement to the witness to give the evidence would be at an end, and the purpose of the provision would be altogether frustrated. Nor is it any answer to the foregoing reasoning to say that, according to the decision of the majority of the judges in *R. v. Cross*,<sup>(a)</sup> bankrupts are compellable to answer, even though they may thereby criminate themselves. Assuming that decision to have settled the law, though there was a division of opinion among the judges, and the case was not brought, as it might have been, before the full court of appeal, the obvious answer is that the protecting clause applies not only to bankrupts under examination (as seems to have been assumed on the opposite view of the question), but to other witnesses as well, and that the latter, unless they can be brought within the protecting clauses of the penal statutes relating to embezzlement, would not be bound to criminate themselves. It is matter of very frequent occurrence, as I have already observed, that third parties who in collusion with bankrupts, or in fraud of bankrupts, have been concerned in transactions which would come within these statutes, are summoned for examination before commissioners in bankruptcy under the 33rd section of the Bankrupt Act. The examination of parties so circumstanced is often most essential to the interest of the creditors, which no doubt was the reason of the extension of the protecting clause to examinations in bankruptcy. But it is obvious that if the efficacy of the protecting clause is impaired by making the entire secrecy of the transaction deposed to the condition of its application, the utility of such examinations will be reduced to nothing, as witnesses so circumstanced will, of course, decline to answer. Moreover, this difficulty applies, not only to examinations in bankruptcy, but to examinations occurring under any form of civil proceeding to which the aggrieved party may resort. And if the term disclosure is to be taken to import that the matter must be before

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(a) Reported in Dearsley & Bell's Crim. Cas., p. 68, but not argued, in consequence of the decision on the same point in *R. v. Scott*, *Id.* 47; 25 L. J. M. C. 128, S. C.

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unknown, where is the line to be drawn? Will communication to an associate, or a friend, or to an indifferent party, be sufficient to exclude? or must it be a communication to a party interested? and, if so, will communication in cases of bankruptcy to a single creditor suffice to exclude, or must it be to the body of the creditors? Again, if knowledge of the transaction on the part of creditors will exclude, what degree of knowledge will suffice? Must it be a knowledge of the entire transaction, and of all its particulars, or will it be sufficient if the transaction has been brought generally to the knowledge of others, while the particulars are left to be gathered from the examination of the party? If the latter, a bankrupt may be compelled to supply the defective links in the chain of evidence against himself, while he would be deprived of the immunity afforded by the act. Moreover, in every case in which the existence of the transaction had become in anywise known, or even suspected or surmised, it would always be a question whether it had become sufficiently known to deprive the witness of his protection, and the judge or commissioner in bankruptcy, who would have to determine whether the witness was bound to answer, would have first to decide the preliminary question whether the circumstances amounted to a disclosure or not, without having the means of ascertaining whether the facts have become known elsewhere, and if so, to what extent; and thus might very likely be called on to compel the witness to answer, where it would be his duty to protect him from unwillingly criminalizing himself. What answer is a judge or commissioner to make if appealed to, and told that the facts to which the witness is called upon to depose have been, in the whole or in part, made known to one or more individuals in public, or in private, clothed with authority to receive the statement or not, as the case may be? Into what innumerable difficulties would not such rule lead in practice? Again, see the hardship upon a bankrupt against whom a prosecution is contemplated, or perhaps already set on foot. It may be that the evidence is inconclusive, or the witnesses open to suspicion. Is it nothing that the accused shall be compelled, though before another tribunal, to admit the facts, and that his admission shall go forth to the public, the effect of which will be that, even if his statement so made would not be evidence against him on his trial, yet, by the publicity given to his avowal, the jury will be already prepared to believe the case against him? But, according to the authority of *R. v. Cross*, not only is a bankrupt compellable to answer, though in so doing he may criminate himself; but his admission may even be brought forward against him on a criminal prosecution. Is such a result consistent with the provision of a statute, which in creating the offence has expressly protected a party disclosing transactions which would otherwise fall within its enactments? No doubt cases will occur, as in the present instance, in which a conflict may arise between the interests of criminal justice and the civil rights which it was the intention of the statute to protect. This the Legislature seems itself to have anticipated,

and to have itself drawn the line, by fixing the time of indictment as the period after which the evidence shall no longer carry protection with it. This, I think, plainly shows that the Legislature contemplated the possibility of the publicity of the transaction prior to the evidence being given. The guilty act must be known before an indictment would be preferred; and, generally speaking, an examination before a magistrate would, as a matter of course, precede the indictment. Is it for us to abridge the period of protection which the Legislature itself has fixed? There is yet another consideration which, to my mind, is conclusive to show that the construction put by the prosecution on the word "disclose" is not the true one. For this construction of the term would, as a necessary consequence, in the case of several co-delinquents, deprive all, except the one first examined, of the benefit of the protecting proviso. In the case of several partners, parties to an offence against the statute, all summoned for examination, all ready to disclose, the accidental circumstance that A. happens to be called before B. and C., though all should give evidence as to the same transaction, would give to A. the preference of protection, while B. and C. would be excluded from it. The same thing would happen where the examination of one of the parties might make it appear expedient to subject the other to examination. In the case now under consideration, supposing all difficulty arising from the previous publicity of the facts had been out of the way, one only of the partners, namely, the one who claimed to be examined first, would be entitled to the protection of the statute, because, the fact having once been made known, it could not, according to this construction, be again "disclosed." The absurdity of the consequence is, to my mind, irresistibly conclusive against the validity of the premises from which it necessarily flows. I am not insensible to the abuses which may be attempted by examining witnesses before commissioners in bankruptcy; but, independently of the observations I have before made as to the inapplicability of any argument founded thereon, I cannot but think the apprehended mischief to be counteracted by rigorously insisting that the protection shall extend only to cases where the evidence is given on examinations instituted *bona fide* for the purpose of advancing the interest of the creditors. But even if this were not so, these inconveniences appear to me to be greatly outweighed by the graver difficulties I have pointed out, and which would have the effect of frustrating the purposes for which the protection is afforded by the law. If on a review of the statute the meaning of the term "disclose" should prove to be what I have suggested, and inconveniences should arise from its application to examinations in bankruptcy, the remedy must be found by fresh legislation, not by a distortion of the sense of the terms of existing enactments. I have lastly to advert to that class of statutes in which protection is afforded to delinquents on their giving evidence of criminal acts in which they have been implicated. In many of these the term "disclosure" or "discovery" (which is used in a synonymous sense)

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occurs. Thus, in the various acts for the appointment of commissions for inquiry into bribery (of which the act of the 15 & 16 Vict. c. 57, ss. 8, 9, and 10, may be taken as an instance), protection is given to offenders making discovery or disclosure of criminal acts in evidence given before the commissioners. Now these statutes, more especially the one just referred to, were all passed in consequence of so many instances of criminal acts having come to light, that a more general inquiry became expedient and desirable. The acts to which a party would come to depose would all be known and notorious before the examination would take place; in a vast number of instances the same witnesses had previously been examined before committees of the House of Commons. Yet it never occurred, or could occur to any one, to suppose that the statement of the witness under the commission was not a discovery or disclosure within the protecting enactment, because the fact deposed to had been before openly stated by him, or otherwise generally known. It never occurred to any one that if one of the parties to a corrupt act had given information, the other, if examined before the commissioners, must be held not to have made a disclosure. And, to make the case as analogous as possible to the present, let me ask what would have been the effect if, prior to the issuing of such a commission, an action had been instituted for penalties, or a prosecution commenced against the offender? Could the purpose of the act be frustrated by holding that there could be no disclosure under such circumstances? I apprehend, beyond all question, not. Again, in the act for the suppression of gaming-houses, 17 & 18 Vict. c. 38, a person taken on suspected premises may be compelled to give evidence as to acts of gaming, or as to the unlawful obstruction of the entrance of the officers; and, if he makes a true and faithful discovery, he becomes entitled to immunity. Yet here the circumstances are notorious; there is no doubt that gaming has been going on; the obstruction to the entrance of the officers is indisputable; a prosecution is already commenced; what is wanted is legal evidence to procure facts of which no moral doubt exists; yet the Legislature treats the evidence given under such circumstances as a discovery entitling the witness to immunity. There are other statutes giving indemnity to offenders simply on their giving evidence of illegal acts to which such statutes have reference, without the use of the term "disclosure" and "discovery." Of this the act 6 Geo. 4, c. 129, s. 6, the act for the suppression of illegal combinations among workmen, is an instance. These acts appear to me most important, as showing that the term "disclosure," as applicable to evidence given by offenders, is used by the Legislature without the consideration of the facts spoken to (being previously unknown) being involved in it; and, further, that where the production of such evidence is deemed desirable, the escape of the offender, even from a pending prosecution, is not deemed a bar to its being obtained by immunity to the offender. Looking, therefore, to the use of the term in question



in legal language, and in statutory enactments relating both to the general administration of the law, and more particularly to purposes similar and analogous to the present, and looking also to the purposes of the present enactment, and the effect of the construction of the word "disclose" with reference to such purposes, I am irresistibly led to the conclusion that the true meaning of the term as it occurs in this statute is the restricted one which attaches to it in all these numerous instances; and that, consequently, the defendants have sufficiently disclosed the offence with which they stand charged, and are therefore entitled to our judgment.

LORD CAMPBELL, C.J.—I by no means wish to offer anything by way of reply upon the judgment we have just heard read by my Lord Chief Justice; but, by way of explanation, I wish to make the single observation that I myself, with my brethren who have agreed with me, am clearly of opinion that the word "disclose" may admit of two interpretations—both the discovery of what was not before known, and a statement of that which was before known; and we are only to look to see in which sense it is used by the Legislature, knowing that in one set of statutes it is meant by way of discovery of that which was before not known, and in other statutes of that which had been before known.

POLLOCK, C.B.—I concur entirely in the judgment of Lord Campbell. I wish to make only one observation upon the subject. There is no word in the English language which does not admit of various interpretations, subject to the remark that it is no doubt frequently found that the imperfection of language leads to litigation on the construction of statutes and the meaning of terms. When we have to consider what is the meaning of a statute, and the sense in which the word is used, I own it appears to me that if we were to construe the word "disclose" as merely "statement"—however much it might have been prevalent, and universally notorious before—we should entirely defeat the object of the Legislature. On the other hand, in my opinion, the intention of the Legislature being to punish crime, if we put the interpretation upon the word "disclose" as making known (and even then there must be a reasonable interpretation of making known for the first time), it is not because it is known to one of the parties, or to the bankrupt—it is not because it may be known to the person whom he has employed in the fraud that he has committed—that therefore it may not be competent to him to disclose it. Even when you adopt that view of the sense which is attributed to the word "disclose," there still will arise those considerations which occur in judicial inquiries under any circumstances. But the ground on which I concur with my Lord Campbell is shortly this:—I am of opinion clearly that an act of Parliament which is directed against crime must have been intended to be effectual; and I think the interest of the public in the punishment of crime was far more within the view of the Legislature than the possible interests of creditors under a commission, or a creditor against a

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debtor; and I think, if we were to construe the word "disclose" in the sense of merely "stating," however much we might have been aware of the object for which it was made (as in this case it was already the subject of a criminal investigation, with everything disclosed before the magistrate, and in the presence of the prisoner), we should, I think, in effect repeal the act of Parliament; and I think we are bound to put that construction on the language of the act which will make it effectual, and not make it abortive.

*Conviction affirmed.*

*Ballantine* (Serjt.) and *Robinson* for the defendant *Skeen*.

*Giffard* for the defendant *Freeman*.

## COURT OF QUEEN'S BENCH.

*April 21, 1859.*

(Before Lord CAMPBELL, C.J., ERLE, CROMPTON, and HILL, JJ.)

MARTIN (appellant) v. PRIDGEON (respondent). (a)

*Conviction—Summons—Variance—Drunk and riotous—11 & 12 Vict. c. 43, s. 1.*

*A person was brought before a magistrate on a summons for being drunk and riotous in a public street, contrary to the statute 10 & 11 Vict. c. 89, s. 29, but the proof failing as to being riotous, the magistrate convicted him under the 21 Jac. c. 7, s. 3, and fined him 5s. for being drunk:*

*Held, that the conviction was bad, and that the defect in the summons was not cured by the 11 & 12 Vict. c. 43, s. 1.*

AT a Petty Sessions held at Torquay (Devon), on the 17th of Jan. 1859, the appellant appeared before the justices of the peace to answer to a summons obtained by the respondent,

"For that he, the said John Martin, on the 12th of January instant, in the public street at Torquay, within the district of, &c., was drunk and guilty of riotous behaviour, contrary to the statute."

The offence was created by the 10 & 11 Vict. c. 89 (The

(a) Reported by J. THOMPSON. Esq., Barrister at-Law.

Town Police Clauses Act, 1847), s. 29: "Every person drunk in any street, and guilty of any riotous or indecent behaviour therein, &c., shall be liable to a penalty not exceeding 40s. for every such offence, or, in the discretion of the justice before whom he is convicted, to imprisonment for a period not exceeding seven days."

The Town Police Clauses Act is incorporated into the Public Health Act, 1848, which had been applied to Torquay.

The charge of drunkenness only was proved to the satisfaction of the justices, that of riotous behaviour not being sustained.

The justices thereupon convicted the appellant of the offence of drunkenness only, under the 21 Jac. 1, c. 7, s. 3, which enacts, "That every person who shall be drunk, and thereof be convicted before one justice or mayor, on view, confession, or oath of one witness, shall forfeit for the first offence 5s." &c.; and they imposed upon him the fine of 5s., to include costs, which was forthwith paid.

The appellant being dissatisfied with the decision of the justices, as being erroneous in point of law, on the ground that the wording of the summons showed that the charge was intended to be laid under the first-named statute, and contending that it was not competent to the justices to convict under the last statute, applied for a case under the 20 & 21 Vict. c. 43, for the opinion of the Court of Queen's Bench, which was granted.

*J. D. Coleridge*, for the respondent.—The question turns on the 11 & 12 Vict. c. 43, s. 1, and unless that applies, it is admitted that the conviction cannot be sustained. "No objection shall be taken or allowed to any information, complaint, or summons for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced on the part of the informant, or complainant, at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing, to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day."

*CROMPTON, J.*—Is not that enactment intended to meet the case of a variance? But here the appellant was brought up on one charge, and convicted upon the evidence of a totally different charge.

*Coleridge.*—Here there was nothing on the face of the summons by which he was misled as to the charge intended to be brought against him. He was summoned for being drunk and riotous, and it was proved that he was drunk.

*CROMPTON, J.*—By the one statute the offence is punishable with a penalty of 40s. or seven days' imprisonment, and by the other with a penalty of 5s. only; and you say it is a variance only, because the evidence proving the latter offence would support part of the former. That is not so; variance points to some difference between the allegation and proof of time or place, or such like

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matters. The proof was of a totally different offence to that in the summons. The magistrates might have had a correct summons drawn up in a moment.

Lord CAMPBELL, C.J.—The appellant was convicted of a totally different offence, under a different act of parliament.

*Sawyer*, for the appellant, was not called upon.

*Conviction quashed.*

## COURT OF QUEEN'S BENCH.

April 28, 1859.

(Before Lord CAMPBELL, C.J., ERLE, CROMPTON, and HILL, JJ.)

HANCOCK v. SOMES. (a)

*Assault—Summons to police court—Dismissal on ground of being of too trifling a nature—9 Geo. 4, c. 31, ss. 27, 28.*

*Where a magistrate dismisses a complaint for assault and battery on any of the three grounds mentioned in sect. 27 of 9 Geo. 4, c. 31, he is bound to grant the certificate provided by that section for the protection of the party accused.*

*He may grant it, though neither party be present at the time he grants it. Where both parties had left the court after the hearing of the case, and in their absence, and without notice to them, the magistrate directed the clerk to make out the certificate before the next case was called on, which the clerk did, and a day or two after sent it to the party entitled to it:*

*Held, a sufficient compliance with 9 Geo. 4, c. 31, s. 27, which directs the magistrates "forthwith" to make out the certificate.*

**A**CTION for assault and battery.

Plea (among others)—That the plaintiff summoned the defendant to the Greenwich Police Court on a complaint of the trespasses in the declaration, that the defendant appeared, and that the case was heard, and that the magistrate found that the said trespasses were so trifling as not to merit any punishment, and dismissed the complaint, and did forthwith make out a certificate stating the fact

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

of such dismissal, and did forthwith deliver the same to the defendant.

At the trial before Erle, J., in London (February 25, 1859), the verdict was directed for the defendant on this plea.

The hearing at the police court took place on the 27th of September, 1858, and after the magistrate had dismissed the summons, the parties left the court. Before the next case was called on, the magistrate ordered the clerk of the court to make out the certificate, pursuant to the 9 Geo. 4. c. 31. Neither of the parties were then present, nor had anything been said about the certificate. The clerk made it out, and a day or two afterwards sent it to the defendant.

A rule *nisi* having been obtained to set aside the verdict,

*Raymond* showed cause.—The 9 Geo. 4, c. 31, s. 27, recites that, whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided, &c., and then provides for the hearing of such cases, and, upon conviction, a penalty, &c., not exceeding 5*l.*; “but if the justices upon the hearing shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, &c., stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.” Then section 28 enacts that if any person who shall have obtained such certificate, or having been convicted, shall have paid the fine, “in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.” The granting of the certificate is not a judicial but a ministerial act; the magistrate cannot withhold it after he has judicially determined whether the case falls within any one of the three classes mentioned in sect. 27, which entitle the party summoned to a certificate. The certificate is in the nature of a record of such judicial finding, and it was not necessary for the parties to be present when such record was made out. If it were necessary to establish that it was made out forthwith, here there is evidence of that, as the clerk was directed to make it out before the next case was called on: (*Tunncliffe v. Tedd*, 5 C. B. 553.)

*M. Lloyd* contra.—This is a kind of statutable plea of *autrefois acquit*, and the Legislature did not intend that the certificate should be simply a record or evidence of the magistrate's decision. The reasoning of the court in *Reg. v. Robinson* (12 Ad. & Ell. 672) shows that the granting of the certificate is a judicial act, and discretionary, and that it should be done when the parties are present. [HILL, J., referred to *Reg. v. Walker*, 2 M. & R. 446.] That was a conviction; here the complaint was dismissed, which is different.

LORD CAMPBELL, C.J.—I am of opinion that this rule should be discharged. The question depends on whether it is discretionary on the part of the magistrate to grant or withhold the

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certificate. If it is discretionary, and in the nature of a judicial act, he ought forthwith to exercise his discretion, and it should be done immediately, and in the presence of the opposite party. I think it is not discretionary; for it is not the policy of legislation that any person who has been once exposed to peril before a tribunal, should be further exposed to peril for the same cause. Here the magistrate held that the offence was too frivolous to merit any punishment, and dismissed the complaint; and having given that judgment he was bound to grant a certificate for the protection of the party accused. Now he did grant it forthwith as it appears to me. As at present advised, I think the party has a right to demand the certificate forthwith. This is not like granting a certificate for a special jury, which is a judicial act, and must be done forthwith: it is in the nature of a ministerial act. After the judgment has been given, the magistrate is to give the certificate, which is a record of that judgment. That being so, the defendant had *de jure* a right to the certificate, and might demand it forthwith, and it is wholly immaterial whether the prosecutor is present or not. It is true that some language of the judges in *Reg. v. Robinson* is inconsistent with this view; but in those remarks I do not concur, nor do they affect the decision in that case, which was correct.

CROMPTON, J.—I am of the same opinion. I think the magistrate is bound to grant the certificate. I cannot see upon what he has to exercise his discretion, after he has come to the decision that the complaint falls within one of the three cases in sect. 27. "Forthwith" may possibly mean that he shall not be allowed to grant it when the matter has passed out of his mind; and *Reg. v. Robinson* can only be supported on that view. The word "shall," used as it is in this section, seems to me to make it imperative on the magistrate to grant the certificate. I also cannot agree in the reasoning of the court in *Reg. v. Robinson*.

HILL, J.—I am of the same opinion. The statute created a new jurisdiction to determine complaints for common assaults and batteries. If the magistrate hears the complaint on the merits and dismisses it on any one of the three points in sect. 27, then, for the protection of the party, he is bound to grant a certificate.

ERLE, J.—I am of the same opinion. It seems to me that the certificate is analogous to a record after verdict.

*Rule discharged.*

## COURT OF QUEEN'S BENCH.

*April 28, 1859.*

(Before Lord CAMPBELL, C.J., ERLE, CROMPTON, and HILL, JJ.)

COSTER v. HETHERINGTON. (a)

*Where a magistrate dismisses a complaint for assault on any of the grounds mentioned in 9 Geo. 4, c. 31, s. 27, he is not bound to grant the certificate given by the section immediately, if not asked for. But if he does grant it immediately on being asked for it, though the application for it is not until some days after the hearing, that is a sufficient compliance with the section which says, "and shall forthwith make out a certificate," &c.*

**A**CTION for an assault.

Plea (among others), that the matter had been inquired into before Mr. Long, the police magistrate, who had dismissed the complaint, and granted the certificate given by the 9 Geo. 4, c. 31, s. 27.

The action was tried before Wightman, J., at the last Surrey Assizes, when it appeared that the assault was committed on the 8th of February, that the plaintiff took out a summons at the Marylebone Police Court, which was heard on the 17th, when Mr. Long dismissed the summons. On the 18th this action was commenced, and the writ served on the 19th. On Tuesday, the 22nd, the defendant's application was made at the police court for a certificate under the 9 Geo. 4, c. 31, s. 27, which was not granted until the 24th in consequence of Mr. Long's non-attendance at the court in the interval. The certificate was dated as of the 17th of February. The learned judge directed a verdict for the defendant on this plea.

A rule *nisi* having been obtained to enter the verdict for the plaintiff for 40s. pursuant to leave,

*Archibald* showed cause.—The 9 Geo. 4, c. 31, s. 57, means that the magistrate is to grant the certificate forthwith on the party asking it. If "forthwith" means within a reasonable time, that must be construed with reference to the object of the statute, and here the application for the certificate was within a reasonable time within that object: (*Reg. v. Worcester*, 7 Dowl. 789; *Page v. Pearce*, 9 Dowl. 815.)

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*Prentice contra.*—This is an act which is to be done forthwith while the matter is fresh in the magistrate's mind. It is like a notice of appeal, which is to be given forthwith: (*Grace v. Clinch*, 4 Q. B. 606.)

Lord CAMPBELL, C.J.—The act of the magistrate in granting a certificate under 9 Geo. 4, c. 31, s. 27, is not judicial or discretionary; he is bound to do it. Having heard the case and formed an opinion upon it, whether he expresses it formally or not, the magistrate is bound on the application of the party accused to grant the certificate. The word "forthwith" does not make it conditional; it is merely an intimation that it is the magistrate's duty to grant the certificate forthwith if demanded. It is not the absolute duty of the magistrate to grant it without being asked for it; but where it is asked for, it is the magistrate's duty to grant it, and he cannot refuse it; and having granted it, it becomes merely a record of what he has before decided. Unless "forthwith" is an imperative condition, it cannot be material that the certificate was not granted immediately on the adjudication. In this case I think that the certificate was granted forthwith within the meaning of the Legislature.

ERLE, J.—It is clear to me that the certificate was intended to be given as a protection to the accused party, and that he had a right to it under sect. 27. It is a matter demandable *ex debito justitiæ*. There can be no use in making the magistrate draw up the certificate if no one demands it. I think that the certificate is given forthwith within the meaning of the section, if given on the application of the party entitled to it.

CROMPTON and HILL, JJ., concurred.

*Rule discharged.*



## COURT OF QUEEN'S BENCH.

*April 30, 1859.*

(Before Lord CAMPBELL, C.J., and HILL, J.)

REG. v. SKELTON. (a)

*Weights and measures—5 & 6 Will. 4, c. 63—Stamping by inspectors—Jurisdiction.**The 5 & 6 Will. 4, c. 63, s. 25, enacts "that any inspector knowingly stamping any weights or measures of any person residing within the limits of any local jurisdiction for which another inspector may have been legally appointed," shall forfeit a sum not exceeding 20s. for every weight so stamped :**Held, that such prohibition applies to all inspectors of weights and measures, whether appointed by the authorities of a city or by the county justices, and forbids each of them from stamping weights or measures of persons residing within a district for which another inspector had been legally appointed.*

**I**N this case Clement Skelton had been convicted by two of the justices for the borough of Carlisle, under the 5 & 6 Will. 4, c. 63, for unlawfully stamping nine iron weights, the property of one Bates.

The conviction was appealed against, and was confirmed by the Court of Quarter Sessions, subject to the opinion of this Court upon a case, which, after referring to the several clauses of the 5 & 6 Will. 4, c. 63, relating to the subject, stated, that under the provisions of that act the justices of the peace for the county of Cumberland had appointed six inspectors, to each of whom a separate district was allotted, and that district stamps had been provided for each inspector for stamping weights, and that one of these inspectors was G. W. Oakley, whose district was called "Cumberland ward," and whose duty was to compare and stamp all weights and measures of persons residing within such district; that the appellant was the inspector appointed under the act for the city of Carlisle; that the appellant at his office in the said city stamped nine iron weights, the property of one Bates, a person

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residing within the said district of Cumberland ward, which were brought to him for that purpose.

The question for the opinion of the Court was, whether the words in the latter part of sect. 25 of the above act, "but that any inspector knowingly stamping any weights or measures of any person residing within the limits of any local jurisdiction for which another inspector may have been legally appointed as aforesaid, shall forfeit a sum not exceeding 20s. for every weight or measure which he may so stamp," prohibit only inspectors appointed by county justices, who come to any place within the limits of such a jurisdiction as that of the city of Carlisle, for the purpose of inspecting and stamping the weights and measures of any person residing within the district for which such inspectors may have been appointed, from stamping weights and measures of persons residing within the limits of such jurisdiction? or whether the words apply to all inspectors, whether appointed by the authorities of the city or the justices of the county, and prohibit each of them from stamping weights and measures of persons residing within a district for which another inspector has been legally appointed?

*Pashley*, for the respondent.—The district inspectors have local jurisdictions, and it is monstrous to suppose that the city inspector should have authority to stamp weights and measures of people residing all over England. The word "jurisdiction" means the places over which their duties extend. Cities and counties are equally local.

*P. Thomson*, contra.—In Carlisle this inspector had power to stamp any weights and measures of persons residing anywhere. The word "exclusively" points only to the persons: (35 Geo. 3, c. 102; 4 & 5 Will. 4, c. 49, s. 10; 5 & 6 Will. 4, c. 63, ss. 17, 21, 24, 25.)

LORD CAMPBELL, C.J.—I am of opinion that these words apply to all inspectors of weights and measures; the act says "that any inspector knowingly stamping any weights or measures of any person residing within the limits of any local jurisdiction for which another inspector may have been legally appointed, shall forfeit," &c. That seems to me to say that an inspector shall be under a certain restriction, viz., that he shall not stamp within his own limits any weight for any person he knows to be living within the jurisdiction of another legally appointed inspector. If he receive an application to stamp such weights, he must send the applicant to his own inspector. I see no inconvenience resulting from such a construction.

HILL, J.—I am of the same opinion. I see no reason to depart from the plain words of the statute. Here the party convicted was appointed for the city of Carlisle, and he knowingly stamped the weights of a person residing in the jurisdiction of another inspector. I think the conviction was right.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*April 30, 1859.*

(Before COCKBURN, C.J., ERLE, J., CROMPTON, J., BRAMWELL, B., and WATSON, B.)

REG. v. J. S. SUNLEY. (a)

*Naval stores—Broad arrow mark—Illegal possession—9 & 10 Will. 3, c. 41, s. 2.*

*Bags marked M, with their contents, addressed to G., an officer of the railway company at Nine Elms, were taken by two females to the Portsmouth station, and duly forwarded to London by railway, and deposited in the goods department of the railway at Nine Elms, London, where G. acted as officer. The prisoner, a marine store dealer at Portsmouth, wrote and telegraphed to such officer of the railway company to deliver the bags to Mr. Emmanuel. This was not done. But a letter written by G., stating "There are several bags lying at this station, consigned by you to me, marked M; to whom are they to be delivered?" was shown to the prisoner by a clerk in the railway office. The prisoner, in reply, directed the clerk to telegraph to deliver to Emmanuel, as before. The bags, in consequence of information, were opened at the goods department, and were found to contain naval stores marked with the broad arrow. Bags had been previously forwarded in a similar manner by the railway to their goods department in London, marked E, which the prisoner had directed to be delivered to Mr. Emmanuel:*

*Held, that there was evidence to support a conviction against the prisoner for having in his custody, possession and keeping naval stores marked with the broad arrow, contrary to the 9 & 10 Will. 3, c. 41, s. 2.*

**T**HE following case was reserved by the Recorder of Portsmouth:—

The prisoner was tried before me at the last Quarter Sessions for the Borough of Portsmouth, upon the following indictment, framed under the provisions of 9 & 10 Will. 3, c. 41:—

Borough of Portsmouth.—The jurors of our Lady the Queen

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upon their oath present, that John Smith Sunley, late of the parish of Portsea, in the Borough of Portsmouth, in the County of Southampton, labourer, on the 28th day of August in the year of our Lord, 1858, with force and arms, in the parish aforesaid, in the borough aforesaid, in the said county, unlawfully had in the custody, possession and keeping of him the said John Smith Sunley, certain naval stores, marked with the mark usually used to and marked upon such like naval stores of our said Lady the Queen, that is to say, 20lbs. weight of copper nails, each of the said nails being stamped and marked with the broad arrow; 30lbs. weight of mixed metal nails, each of the said mixed metal nails being stamped and marked with the broad arrow; 50lbs. weight of pieces of copper, each of the said pieces of copper being stamped and marked with the broad arrow; and 50lbs. weight of pieces of mixed metal, each of the said pieces of mixed metal being stamped and marked with the broad arrow; which said naval stores so stamped and marked as aforesaid, were then and there found in the custody, possession and keeping of him the said John Smith Sunley, not being a contractor with the principal officers or commissioners of our said Lady the Queen, of the Navy, Ordnance, or Victuallers for the use of our said Lady the Queen, or employed by any contractor with the principal officers or commissioners of our said Lady the Queen, of the Navy, Ordnance, or Victuallers for the use of our said Lady the Queen; and he the said John Smith Sunley not being a contractor with the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, for the use of our Lady the Queen, or employed by any contractor with the said last mentioned Commissioners for the use of our Lady the Queen to make any stores of war or naval stores whatever, to the diminution of the naval stores of our said Lady the Queen, against the form of the statute in such case made and provided, against the peace of our Lady the Queen, her crown and dignity.

The following facts and documents were proved:—

The prisoner was a dealer in marine stores, carrying on business at Portsmouth.

On the 27th of August, 1858, several bags marked with the letter M, and addressed to Mr. Godson, Nine Elms station, were brought to the Landport station, at Portsmouth, of the London and South Western Railway, by two women, and were dispatched by the train to London.

They arrived safely and in the same condition in which they were dispatched from Portsmouth, at the Nine Elms station, where they were unloaded and deposited in the goods department of the London and South Western Railway, at the station.

Bags similarly addressed, but marked with the letter E, had several times before been sent in a similar manner from Portsmouth to London.

The following paper was written by the prisoner at the Nine Elms station, some time before any bags addressed to

Mr. Godson, and marked with the letter E, had been received there:—

“Goods marked E always deliver to the order of A. Emmanuel, 51, Marylebone-lane.”

On the 26th of August, 1858, the following letter, in the handwriting of the prisoner, was received by Mr. Godson, at the Nine Elms station, through the post:—

“Mr. Godson.

“Sir,—Please to deliver goods marked M to Mr. Emmanuel, and oblige,

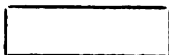
“Yours respectfully,

“J. S. SUNLEY.”

On the 1st of September, 1858, the prisoner came to the goods department of the Landport station at Portsmouth, belonging to the London and South Western Railway, and saw there the clerk of the goods department. He produced to the clerk the following letter written for Mr. Godson, and at his desire, by Mr. Scott, the chief clerk at the Nine Elms station:—

“London and South Western Railway,  
“Superintendent’s Office, Nine Elms. (S.)

“In your reply



refer to the enclosed.

“Dear Sir,

“There are several bags lying at this station, consigned by you to me, and marked M. To whom are they to be delivered or forwarded? Mr. Emmanuel has applied for goods from you lying to his order, but as I am not aware he is entitled to these bags, I have declined to deliver until I am advised who is the real owner.

“Yours obediently,

“W. F. GODSON,

“p. S. W. R.

“Mr. Sunley, 26, Plymouth Street, Southsea.”

Indorsed on the back of this, in pencil, in the prisoner’s handwriting, were these words:—

“Sir,

“Mr. Mountain,—Please telegraph to deliver M to Mr. Emmanuel, as before, and oblige,

“Yours,

“J. S. SUNLEY.”

The prisoner had also with him another paper written, which he

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showed to the clerk, on which were the following words in his own handwriting:—

“To Mr. Godson.

“All the goods lying at the station marked M, to be delivered to Emmanuel, as previously advised. Advise Emmanuel on receipt of this, with instructions to remit by return of post. To M. E. C.—Please to apply for goods and remit on account.”

On the back of this second paper were written, also in the prisoner's handwriting, the following words:—

“I have been expecting the cash, and Mr. Godson's forgetfulness or oversight has inconvenienced me much. Should it prove my fault, I will pay. If not, I expect not to pay.

“Yours respectfully,

“J. S. SUNLEY.”

He requested the clerk to telegraph to London, to Mr. Godson, the words written on the face of this second paper, and set out above.

The clerk refused to telegraph the whole message, but did telegraph as follows to Mr. Godson:—

“Please to deliver the bags of goods marked M to Mr. Emmanuel.”

The following letter in the prisoner's handwriting was received on the 2nd of September, through the post, by Mr. Godson:—

“26, Plymouth Street, Southsea,  
“Sept. 1, 1858.

950

696

See also

950

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“Mr. Godson.

“Sir,—I wrote to you to deliver goods marked M to Mr. Emmanuel. This I expected to stand until further orders, instead of keeping them at Nine Elms. I had a strong reason for changing the letter, and may have again some day, but always continue to deliver the last instructions in future. I shall have no more goods for B. & Co., as they are bankrupts, and dressed me in 100L. I forwarded a parcel last week to Jackson, Leeds; he writes not received yesterday.

“Yours respectfully,

“J. S. SUNLEY.”

The bags, in consequence of information as to their contents, were opened and examined at Nine Elms, and found to contain a quantity of naval stores marked with the broad arrow.

The jury found the prisoner guilty, and I sentenced him to six months' imprisonment.

I reserved for the consideration of the Justices of the Queen's Bench and Common Pleas, and the Barons of the Exchequer, the question,

Whether there was any evidence of the naval stores having been found in the custody, possession or keeping of the prisoner within the meaning of the 9 & 10 Will. 3, c. 41, s. 2? and I now humbly request their opinion there on.

If they should be of opinion that there was no evidence of such finding, the question is to be quashed; otherwise it is to be affirmed.

J. D. COLERIDGE,  
Recorder of Portsmouth.

*Poulden* appeared for the prosecution, but was not called upon by the Court.

No counsel appeared for the prisoner.

COCKBURN, C.J.—We are all agreed that in this case the conviction must be affirmed.

*Conviction affirmed.*

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—  
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—

*Naval stores—  
Illegal  
possession.*

## COURT OF CRIMINAL APPEAL.

*April 30, 1859.*

(Before COCKBURN, C.J., ERLE and CROMPTON, JJ., BRAMWELL and WATSON, BB.)

REG. v. AVERY AND ANOTHER. (a)

*Larceny—Husband and wife—Wife taking away husband's goods—Third persons assisting.**A. and B., relatives (uncle and cousin) of the wife, assisted the wife in packing and removing the husband's goods, the wife intending to leave the husband's dwelling and not intending to return to him. There was no evidence that the wife had committed adultery with either of the prisoners, or intended to do so. The jury found that the prisoners took the goods without the knowledge or consent of the husband, but with the intent to deprive him of the property in them :**Held, that the conviction could not be sustained, as it had not been left to the jury to say whether the prisoners took the goods at the time animo furandi, as principals, or whether they were merely assisting the wife to carry off the husband's goods.*

CASE reserved by the Recorder of the Liberty of Romney Marsh, from the Spring Quarter Sessions, 1859.

The indictment charged the prisoners, Henry Avery and William Henry Avery, with stealing a carpet, a feather-bed, boxes, baskets, and a quantity of wearing apparel, the property of the prosecutor Carpenter, from his dwelling-house.

The prosecutor was a labouring man living with his wife. The prisoner Henry was uncle, and the prisoner William Henry was cousin, to his wife.

The prisoners came together on the night of the 7th of February, and again on the night of the 10th, to the prosecutor's house, without his knowledge, and after he had gone to bed. The wife was at home on each occasion, and admitted them. On the first night they packed and took away, in the wife's presence and with her privity and consent, a box containing property of the prosecutor; and on the second night they took, in her presence and with her privity and consent, a carpet, and a large iron cooking-pot.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.



On the morning of the 11th, after the prosecutor, who was in the habit of leaving home early, had gone to his work, the prisoner William Henry went to the prosecutor's house, between eight and nine o'clock, and, with the wife's privity and consent, carried away the bed and placed it in a granary at a short distance, requesting the person who gave him permission so to do, that the prosecutor should not be informed of it.

Prisoner, William Henry, then returned to prosecutor's house, and shortly after went away with the wife, William Henry taking with him a basket containing property of the prosecutor.

The wife left her husband's house without his knowledge and assent, and without the intention of returning.

They went together to the house of Henry, the other prisoner, at a distance of about three miles.

The prosecutor was informed on the same Friday that his wife and goods were gone, and he went that evening with the constable to the prisoner Henry's house. Henry was in, and being asked, denied that he had any property of the prosecutor's, or anything in the house that was not his own, on which the house was searched, and a milk-jug of the prosecutor's was found in the bedroom, concealed between the bed and the sacking of the bed; and also, in the same room, several other articles belonging to the prosecutor. In a room in an adjoining house, where Henry Avery, by permission, had placed some of the property, of which room he produced the key, after a denial by him that he had it, were found two boxes of the prosecutor's with his property therein, upon which boxes was the following address in the handwriting of the prisoner William Henry: "H. Avery, to be left at the Rose Inn, Folkestone," with the additional words "by Sharwood" on one of them. The prosecutor's goods also were found in the granary, where the prisoner William Henry had placed them.

There was no evidence to show that the wife remained at the prisoner Henry's house, or that she had committed adultery with either of the prisoners, or intended to do so. She was not called as a witness.

It was contended by the counsel for the prisoners, that, to make them guilty of felony, there must be either an adultery committed, or an elopement with the wife with intent to live in adultery with one of them, or with somebody else, with their knowledge and assistance; and *Reg. v. Harrison*, 1 Leach, C. C. R. 47, was relied on.

The jury found that the prisoners took the goods without the knowledge or consent of the husband, and with the intention to deprive him absolutely of his property in them.

As it appears doubtful, upon the authorities, whether adultery committed or contemplated is necessary to constitute a felonious taking in cases of this nature, I directed a verdict of guilty to be entered, that the opinion of the Court for the Consideration of Crown Cases Reserved might be taken upon the question whether upon these facts the indictment was supported.

JOHN DEEDES.

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v.  
AVERY  
AND  
ANOTHER.  
—  
1859.  
—

*Larceny—  
Husband and  
wife.*

REG.  
v.  
AVERY  
AND  
ANOTHER.

1859.

Larceny—  
Husband and  
wife.

No counsel appeared on either side, but while the Court were deliberating the case of *Reg. v. William Berry*, 28 L. J. 70, M.C., and 8 Cox Crim. Cas. 117, was handed up, of which the following is the marginal note:—

“A., being about to elope with B.’s wife, engaged a porter to bring his cart to the husband’s house, which he did, and A. then assisted the wife in packing up the husband’s property and placing it in the cart. A., the wife, and her three children then went away with the things to a distant place, where the wife took lodgings in her own name, and afterwards A. and the wife being found living there, A. was charged with stealing the things.

“Held, that it was a proper direction to the jury to tell them that, if they were satisfied that A. and the wife, when they so took the property, went away together for the purpose of having, and afterwards had, adulterous intercourse, they ought to find the prisoner guilty; but that if they believed that they did not go away with any such purpose, and had not committed adultery together, the prisoner was entitled to an acquittal.”

COCKBURN, C.J.—We are of opinion that the conviction in this case cannot be sustained. It is clear, on the finding of the jury, that no adultery took place between the prosecutor’s wife and either of the prisoners, or was intended, and it is not found that there was any intention on the part of the prisoners, when she abandoned her husband’s dwelling, to commit a felony. The goods were taken away with the privity of the wife when she was abandoning her husband’s dwelling. It is not necessary for us to lay down as law that, supposing a stranger stole the goods of the husband, and the wife was privy to it and consenting, such privity and consent would, if there was *animus furandi* in the stranger, exonerate him from what would otherwise be larceny. But in deciding that this conviction should be quashed, we do not intend to say that we adopt that conclusion. We take, however, this to be clear, that a wife cannot be guilty of larceny in taking the goods of her husband, and if a stranger do no more than merely assist her in the taking, inasmuch as the wife as principal cannot be guilty of larceny, so neither can the stranger as accessory be guilty. In this case it was not found whether, when this act was done, the prisoners were acting as principals, or whether the goods were taken by the wife to deprive the husband of them, and the prisoners were merely assisting her. Under any circumstances, assuming that the prisoners could have been guilty of larceny, that is an essential consideration which ought to have been left to the jury, and that being undecided, we must adopt the view of the case most favourable to the prisoners, and we think, therefore, that the conviction must be quashed. *Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

May 7, 1859.

(Before COCKBURN, C.J., ERLE and CROMPTON, JJ.,  
BRAMWELL and WATSON, BB.)

REG. v. HARRIET WEBSTER. (a)

*Perjury—Indictment—Certainty.*

*An indictment for perjury stated that a cause was pending in a County Court, &c., and that on the hearing of the cause it became and was a material question, whether the plaintiff had, in the presence of the prisoner, signed at the foot of a certain bill of account between a certain firm, called Bridges and Co. and W., a receipt for payment of the amount of the said bill, and that the prisoner falsely, &c., swore that he, the said plaintiff, did on a certain day, in the presence of the prisoner, sign the said receipt (meaning a receipt at the foot of the said first mentioned bill of account) for the payment of the amount of the said bill:*

*Held, that the indictment was sufficiently certain, although it appeared that the plaintiff had signed many similar receipts in presence of the prisoner.*

CASE reserved by Cockburn, C.J., at the Suffolk Spring Assizes, 1859.

The prisoner was tried for perjury.

The indictment charged that a certain cause, in which John Hart Bridges and Henry Cuthbert were the plaintiffs, and Joshua Webster the defendant, was pending in the County Court, and came on to be heard and tried before John Worlledge, Esq., the judge of that court; that on the trial and hearing of such cause it became a material question whether the said John Hart Bridges had, in the presence of the said Harriet Webster, the prisoner, signed at the foot of a certain bill of account, purporting to be a bill of account between a certain firm called Bridges and Co. and the said Joshua Webster, a receipt for payment of the amount of the said bill; that the said Harriet Webster falsely, corruptly, knowingly and maliciously swore, among other things, that the said John Hart Bridges did on a certain day, in the presence of the said Harriet Webster, sign the said receipt (meaning a receipt at

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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the foot of the said first mentioned bill of account) for the payment of the amount of the said bill, whereas, &c.

It was proved by the judge of the County Court that, on the trial of the cause of *Bridges and another v. Webster*, the prisoner, who was the wife of the defendant in that suit, produced, in answer to the claim of the defendants for goods supplied in the way of their business as brewers, an invoice of goods, at the foot of which was a receipt which purported to bear the signature of the plaintiff Bridges; and the prisoner then swore that, at a time and place specified by her, the said Bridges in her presence wrote and signed the receipt in question.

Mr. Bridges being called on the trial of the indictment, distinctly negatived ever having written or signed the receipt, either in the presence of the prisoner or elsewhere, and swore that neither the receipt nor the signature was in his handwriting.

Another witness also proved that the handwriting was not that of Mr. Bridges.

It was objected, on behalf of the prisoner, that the indictment was defective, as not sufficiently specifying the account and receipt to which the evidence, on which the perjury was assigned, related, and that, as it had been admitted by the prosecutor in cross-examination (as was the case) that he had on other occasions signed receipts in the presence of the prisoner, at the foot of invoices or accounts rendered by his firm to the husband, there was nothing in the indictment to show that the prisoner's statement might not have referred to some such genuine receipt and signature.

The learned judge left the case to the jury, reserving the point above set forth for the consideration of the Court.

The prisoner was convicted.

According to the opinion of the Court on the point of law, the conviction was to stand or to be set aside.

*Orridge*, for the prisoner.—The indictment is bad on the face of it. It is too uncertain and indefinite to enable the prisoner to meet the charge intended to be proved against her. It appeared that a great many receipts had been signed by the prosecutor in the prisoner's presence. The indictment ought to have alleged that the receipt intended to be used in evidence on the trial for perjury was the one shown to her on the trial in the County Court.

CROMPTON, J.—You say the indictment is bad on the face of it. What have we to do with the evidence?

COCKBURN, C.J.—Laxity of pleading ought not to be encouraged. Nothing would have been more easy than to state that the receipt was produced and shown to the prisoner on the trial in the County Court; but how can you get over the 14 & 15 Vict. c. 100, s. 1? You say that the indictment is defective, because it does not sufficiently show that the receipt was the one sworn to by the prisoner in the County Court. That is matter of form, and might, if the objection had been made in proper form, have been cured.

*Orridge*.—No; it is submitted that the objection is matter of substance. An indictment for perjury committed in the Insolvent Debtors' Court alleged that the defendant swore in substance that his schedule contained a full, true and perfect account of all debts owing to him at the time of presenting his petition; whereas the said schedule did not contain a full, true and perfect account of all debts owing to him at that time; and Lord Tenterden, C.J., after consulting the other judges of the Court of King's Bench, held that the indictment was insufficient, as it was quite impossible that the defendant could know from allegations so vague and indistinct what was to be proved against him; the allegations conveyed no information whatever of the particular charges against which the defendant ought to be prepared to defend himself: (*Rex v. Hepper, Ry. & Moo. N. P. R. 210.*)

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No counsel appeared for the prosecution.

COCKBURN, C.J.—We are all of opinion that the indictment is sufficient, and that the conviction is good. For my own part, I thought at first that there should have been more particularity in the statement of the document, but upon consideration, and looking at the real nature of the charge—that of having given false testimony upon the trial in the County Court—there is no necessity to refer to the document at all in the indictment, and the reference thereto only arises incidentally, as introductory to making out the charge upon which the perjury is assigned. We therefore think that the document is sufficiently stated and set forth in the indictment.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*April 30, 1859.*

(Before COCKBURN, C.J., ERLE and CROMPTON, J.J., and  
WATSON and BRAMWELL, B.B.)

REG v. SIMMONDS. (a)

*Perjury—Bastardy summons against the putative father—No proof of payment of money within the twelve months—Hearing—Jurisdiction of the petty sessions—Waiver—7 & 8 Vict. c. 101, s. 2.*

*A summons after the birth of a bastard child, under 7 & 8 Vict. c. 101, s. 2, against the putative father, which issued on the application of the mother, was regular on the face of it, and alleged that proof had been given of payment of money by the father, within the twelve months after the birth of the child, for its maintenance. The father appeared to answer the summons at the petty sessions, and made no objection to the jurisdiction of the justices or otherwise, but was sworn on his own behalf, and gave evidence in respect of which he was afterwards indicted for perjury. On the trial of the indictment for perjury, the jury found the defendant guilty, and found also that the defendant had not within the twelve months next after the birth of the child paid any money for its maintenance :*

*Held, on the authority of Reg. v. James Berry (8 Cox. Crim. Cas. 121), that the justices at the petty sessions had jurisdiction to hear the summons, and that the defendant had waived the objection, the summons to the putative father to appear at the petty sessions being matter of process only, and not of substance essential to the jurisdiction of the petty sessions.*

THE following case was reserved by Byles, J.

The prisoner was indicted for perjury, committed before the justices in petty sessions, on the hearing of a summons to answer a complaint that he was the father of a bastard child.

No proof had been given to the summoning justice that the defendant had paid any money for the maintenance of the child within the twelve months next after its birth.

The justices in petty sessions made an order of affiliation against him.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

All the assignments of perjury were abandoned by the prosecution, except on these three statements of the defendant on oath at the hearing before the justices in petty sessions :—

First, I never had any connexion with the complainant.

Secondly, I have never given her a farthing.

Thirdly, I was not present at Mrs. Griffith's when Mrs. Lewis says I gave her money.

It was proved, both before the magistrates and at the trial, that the child of which the defendant was the father was born so long ago as October, 1852, and though the jury found the three assignments of perjury against the defendant, yet they found also that the defendant had not, within twelve months next after the birth of the child, paid any money for its maintenance.

It was objected by the prisoner's counsel that under these circumstances there was no jurisdiction in the magistrates in petty sessions to hear the complaint, and therefore that the defendant could not, in point of law, be guilty of perjury in swearing as above: (see 7 & 8 Vict. c. 101, s. 2, and 8 & 9 Vict. c. 10, sched. No. 8.)

I directed the jury on these findings to return a general verdict of guilty, but saved the point.

The defendant is out on bail.

J. B. BYLES.

The above summons was in the form given by the 8 & 9 Vict. c. 10, sched. No. 8, with a slight variation. It stated in the recital that the mother gave proof to the said justice that the said George Simmonds did within the twelve calendar months next after the birth of such child pay money for its maintenance, and the said justice thereupon issued his summons to the said George Simmonds to appear at a petty session to be holden, &c.

*H. T. Cole*, for the prisoner.—The conviction is bad. The jury having found that there was no money paid by the defendant for the maintenance of the child within twelve months next after the birth of the child, the summons and order at the petty sessions were without jurisdiction. The 7 & 8 Vict. c. 101, s. 2, enacts that any single woman who may be delivered of a bastard child, may at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice, &c., for a summons to be served on the man alleged by her to be the father of such child. It is contended that a justice has no jurisdiction under this section to issue a summons, unless he has proof before him of payment of money for the maintenance of the child within the twelve months. Before this statute the justices had no power to issue a summons under such circumstances, and their jurisdiction was created by sect. 2.

*CROMPTON, J.*—We must take it that the summons stated that such proof had been given. Then why had not the justices power to enter on the inquiry, the summons being regular on the face of it?

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ERLE, J.—If the defendant, when before the justices upon the summons, had objected that there was no jurisdiction to issue the summons or make any order upon it, why could they not have entertained such an inquiry and dealt with the objection as they thought right?

*Cole.*—Still, it is open to the defendant to show by affidavit that the order was made without jurisdiction; and the jury having found that there was no proof of payment within the twelve months, the whole matter at petty sessions was *coram non judice*. The test of jurisdiction is, whether or not the justices had power to enter on the inquiry, not whether their conclusions in the course of it are true or false; and it may be shown by affidavit that they had no authority to commence an inquiry: (*Reg. v. Bolton*, 1 Q. B. 66.)

ERLE, J.—The case of *Reg. v. Bolton* distinctly affirms that the justices at petty sessions must proceed to inquire into the circumstances necessary to found their jurisdiction.

*Cole.*—In *Reg. v. Scotton* (5 Q. B. 493; 13 L. J. 58, M. C.), it was held that if an information under the Game Act leaves it doubtful whether it was laid by a party deposing on oath to the matter of charge, all further proceedings upon it are without jurisdiction, and a witness giving false evidence on the hearing of it cannot be convicted of perjury. (Paley on Convictions, 15, 4th edit.; and *Reg. v. Evans*, 4 New Ses. Cas. 191, were then cited.)

COCKBURN, C.J.—How do you distinguish the present case from *Reg. v. James Berry*, 1 Bell C. C. 46; 8 Cox Crim. Cas. 121?

*Cole.*—There can be no waiver of jurisdiction. In *Berry's* case, Martin, B., was of opinion that the proof on oath was a condition precedent to the granting of the summons; and that the jurisdiction being a special one, the proceedings must be strictly conformable to the regulations prescribed by the second section: (*Cole's* case, Sir W. Jones, 139, 170.) The case of *Reg. v. The Justices of Wiltshire* (12 A. & E. 793) was then referred to. Again, the defendant was not aware that the summons had issued without proof of payment, and could not therefore waive it. This provision, having been passed for the public benefit, could not be waived, for waiver can only take place in respect of matters in which the party has a personal interest solely. No doubt, if this had been in the nature of a benefit for the sole benefit of the putative father, the maxim *Quilibet potest renunciare juri pro se introducto* would apply, and the defendant could have waived it: (*Graham v. Ingleby*, 1 Ex. 651.) But this is not a provision of that character. It is more like the case of *Goodwin v. Parry* (4 T. R. 577), where it was held that an irregularity in the plaintiff's omitting to make an affidavit, required by the Lottery Act (27 Geo. 3, c. 1, s. 2), specifying the amount of penalties sued for previously to issuing a writ in a *qui tam* action to recover penalties, was not waived by the defendant's not objecting in the first instance.



CROMPTON, J.—Was it not within the jurisdiction of the justices at petty sessions to inquire whether the allegations in the summons were true or not? On all those allegations issues are distinctly raised before the justices.

Cole then cited, *Caudle v. Seymour* (1 Q.B. 889); *Reg. v. The Guardians of Hartley Wintney Union* (Ib. 677); *Lawford v. Part-ridge* (26 L. J. 147, Ex.); *Rex v. Croke* (Cowp. 26); *Thompson v. Ingham* (19 L. J. 189, Q.B.); *Reg. v. Fuller* (2 Dowl. & L. 98); *Cox v. Tulloch* (2 Dowl. 48.) The defect here was a nullity, and the defendant had no knowledge of it, and could not waive it; (*Hanson v. Shackleton*, 4 Dowl. 48; *Taylor v. Phillips*, 3 East, 155.)

*F. Edwards*, for the prosecution, was not called upon.

COCKBURN, C.J.—We do not think that it is necessary to call on the counsel for the prosecution, as we are all of opinion that the conviction should be affirmed. The case is governed by the principle of the decision in *Reg. v. James Berry*. That case clearly shows that the position advanced by the prisoner's counsel is untenable. He has endeavoured to show that, under the provisions of the 7 & 8 Vict. c. 101, it is necessary, in order to give jurisdiction to the justice on an application by the mother of a bastard child for a summons against the putative father, that proof on oath should be given that money had been paid by him within twelve months next after the birth of the child for its maintenance; and he has endeavoured to establish that the absence of such proof is a radical and incurable defect, and fatal to the jurisdiction of the magistrates who are afterwards called on to adjudicate on the summons. The case of *Reg. v. James Berry*, however, shows that that is not so, and that this is not a matter of substance essential to found the jurisdiction of the justices, but a matter of process only, which may be waived by the defendant if he chooses to waive it. It follows, therefore, that it is not of the essence of jurisdiction. If that is so, this case is still stronger than the one of *Reg. v. James Berry*, where the defect was on the face of the summons. Now here there is no defect apparent on the face of the summons, and therefore it was the duty of justices at the petty sessions to proceed (and they did so proceed) to hear and decide on the complaint. No defect on this ground was then brought under their cognisance; and, in the course of the hearing of the complaint, the evidence of the defendant was given on oath, and it is in respect of that evidence that perjury has been assigned in this indictment. This case, therefore, is stronger than *Reg. v. James Berry*, and must be governed by it.

The rest of the Court concurring,

*Conviction affirmed.*

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v.  
SIMMONDS.  
—  
1859.  
—  
Perjury—  
Jurisdiction.

## COURT OF CRIMINAL APPEAL.

*April 30 and June 4, 1859.*

(Before COCKBURN, C.J., ERLE and CROMPTON, JJ., BRAMWELL and WATSON, BB.)

REG. v. GEORGE MORRISON. (a)

*Larceny—Receiving—Pawnbroker's duplicate.**A pawnbroker's duplicate is the subject of larceny, either as a thing valuable in itself, or as a warrant for the delivery of goods, within the 7 & 8 Geo. 4, c. 29, s. 5.**A conviction for receiving a pawnbroker's ticket knowing it to have been stolen, was therefore held to be good.***T**HE prisoner was tried before me at the last Kent Spring Assizes, 1859.

The indictment was for larceny and receiving.

The first count, larceny of a warrant for delivery of goods, viz., for the delivery of a watch.

Second count, larceny of a pawnbroker's ticket.

Third count, larceny of a piece of paper.

Fourth count, for receiving all these, knowing them to have been stolen.

A pawnbroker's ticket, of which the following is a copy, was stolen:—

“George Gegan, 41, High-street, Brompton. 25th Nov. 1858. (213.) Gold watch, 1*l*. 5*s*. John Hallsall, Brompton-barracks—Money lent on plate, watches, furniture, &c.”

The prisoner was convicted of receiving it, knowing it to have been stolen.

I request the opinion of the Court, whether the committal is lawful.

See stat. 7 &amp; 8 Geo. 4, c. 29, s. 5.

SAMUEL MARTIN.

*White* appeared for the prosecution.—The conviction is right. First, a pawnbroker's duplicate is a warrant or order for the delivery or transfer of goods or valuable thing, the stealing of

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

which is punishable by the 7 & 8 Geo. 4, c. 29, s. 5, as felony. Pawnbrokers are bound by the 39 & 40 Geo. 3, c. 99, s. 6, at the time of taking any pawn, to give to the person pledging a note or memorandum specifying certain particulars pointed out; and by sect. 15, for the protection of pawnbrokers, any person producing the note or memorandum, required by sect. 6, to the pawnbroker, "as the owner thereof, or as authorized by the owner thereof to redeem the same, and require a delivery of the goods or chattels mentioned therein," such person shall be, and is, hereby deemed and taken to be the real owner and proprietor of such goods and chattels, and the pawnbroker shall be, and is, hereby directed and required, after payment of principal and interest, to deliver such goods and chattels to the person producing such note, &c. A duplicate is *prima facie*, by this section, a warrant to the pawnbroker to deliver the pledge to the party producing the duplicate.

CROMPTON, J.—That section seems to be rather a justification for the pawnbroker's parting with the pledge to the person producing the ticket.

*White*.—It only gives a conditional protection in case of no notice from the real owner, or of the goods being suspected to be fraudulently obtained. So a judicial warrant is a justification to a person acting under it. The pawnbroker is warranted by the statute in delivering up the pledge to the person having the duplicate. Duplicates are sold, very commonly, and they constitute the vendee's authority for getting the pledges.

COCKBURN, C.J.—*Per se* the document warrants nothing. It is an acknowledgment of the receipt of the pledge.

CROMPTON, J.—Does not the 7 & 8 Geo. 4, c. 29, s. 5, mean the warrant or order of a third person on the holder to deliver up to some one else?

*White*.—It has been held that a pawnbroker's duplicate in the form prescribed by the 39 & 40 Geo. 3, c. 99, is an accountable receipt for goods within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and that a person may be guilty of forging and uttering the same: (*Reg. v. Fitchie*, 7 Cox Crim. Cas. 257.) A duplicate is analogous to a bill of lading, which seems to be in the nature of a warrant for the delivery or transfer of goods.

COCKBURN, C.J.—Is a promissory note an order or warrant for the payment of money?

BRAMWELL, B.—Why has not this become a thing of intrinsic value? If so, *Reg. v. Watts* (4 Cox Crim. Cas. 336) would apply, and a person might be guilty of larceny in stealing it.

*White*.—Duplicates are bought and sold, and, if lost, the pawnbroker is required by sect. 16 to deliver a copy to the pawnee.

CROMPTON, J.—Has a duplicate any other value than as evidence of title?

*White*.—In *Rex v. Bingley* (5 C. & P. 602), where a man was knocked down and his pockets rifled, and nothing found except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held maintainable.

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CROMPTON, J.—But if it had been an agreement it is clear that it could not have been larceny.

*White.*—A railway ticket, it has been held, may be the subject of false pretences.

ERLE, J.—The description of documents in the Factors Act is analogous to this instrument.

No counsel appeared for the prisoner.

*Cur. adv. vult.*

June 4.

CROMPTON, J., now delivered the judgment of the Court.—We are of opinion that the conviction is right, and ought to be affirmed. The question is, whether a pawnbroker's ticket in the usual form is the subject of larceny, and is properly described, either as a warrant for the delivery of goods, a pawnbroker's ticket, or a piece of paper. We think that the instrument in question is a warrant for the delivery of goods within the meaning of the 7 & 8 Geo. 4, c. 29, s. 5, and that the stealing of such a document is an offence subjecting the offender to the same punishment as if he had stolen chattels of the like value as the value of the goods mentioned in the document. Probably the word "order" in this section would require that the instrument should contain a direction from one person to another to deliver or transfer goods; but we think that the word "warrant," as applied to the delivery of goods in this section, has a wider signification, and comprehends any instrument which warrants or authorizes the party holding the goods to deliver them, and requires him so to do. The Pawnbrokers Act, 39 & 40 Geo. 3, c. 99, seems to give this effect to the instrument. By the 15th section of that statute, the person producing such ticket "as owner," or "as for the owner," is to be deemed, as far as the pawnbroker is concerned, to be the owner, and the pawnbroker is expressly directed and required to deliver the goods to the person so producing the ticket. It is said that this is for the protection of the pawnbroker, according to the preamble of the section; but its being so is no reason against its being a warrant, the very essence of a warrant being an authority to deliver up, and a protection in so doing; and the express direction and requirement by this section to deliver to the party producing, shows that, though the clause was intended to protect the pawnbroker, it at the same time gave the right to the bearer to require the delivery. It does not seem to us any answer to say that the delivery is only to be when there is no notice or knowledge of another title, or of a fraud or felony, as a similar state of things would arise with reference to a delivery order, when it appeared to have been improperly obtained, or to represent goods obtained by theft or fraud; nor do we think it necessarily not a warrant by reason of its being an acknowledgment or token given only by the party holding the goods. Instruments are treated as warrants in the course of commercial transactions which are of this nature, and which are given to parties warehousing goods in such a manner as to be the warrant to the depositor or holder of

the goods to deliver either to the party to whom the documents are delivered, or to the person obtaining them from him. And thus the document is a warrant not only to the party to whom the original depositor disposes of it, but also in the hands of the original depositor himself. Now the statute gives this very effect, as it appears to us, to the ticket which it requires the pawnbroker to give, and the pawnor to receive; and looking to the legal effect of the instrument, and the operation given to it by the statute, and not to the mere form in which it is expressed, it seems to us that the pawnbroker's ticket may well be held to be a warrant for the delivery of goods within the meaning of the 7 & 8 Geo. 4, c. 29. But supposing such a ticket not to be a warrant for the delivery of goods within the provisions of the statute, we are of opinion, on the other point in the case, that the conviction was right, as for stealing a pawnbroker's ticket or piece of paper. It is clearly so, unless it fall within the rule of the common law, by which certain documents of title, and certain documents concerning mere choses in action, were not the subject of larceny. We are not at liberty to infringe a rule so long settled, and which has been acted upon until the present time; but we should be very reluctant to extend such a rule, and we ought to be careful not to apply it to cases to which the authorities do not clearly show it to be applicable. The state of the law in this respect was well remarked upon a hundred years ago by counsel: (Strange, 1122.) He says: "If I steal a skin of parchment worth a shilling, it is a felony; but when it has 10,000*l.* added to its value by what is written upon it, it is no offence to take it away." And he proceeds to say: "The use to be made of this observation is that, so far as the law is settled, it is not to be altered; but if it does not exempt this particular case, there is no reason to exclude it." And in this remark we fully concur. Documents of title to real property are not the subject of larceny; but we find no rule extending such doctrine to documents and tokens showing a right to personal property; and the way in which the rule is enunciated as to real property seems to show that it does not apply to documents relating to personalty. Again, if it is a document relating to or concerning a mere chose in action—as a bond, bill, or note—that is, as I understand it, a matter resting in contract, and giving a right by way of contract only, it is not the subject of larceny. In *Reg. v. Watts* (1 Dears. C.C. 330), Alderson, B., asks: "Is not the reason why a chose in action is not the subject of larceny this, because it is evidence of a right, and that you cannot steal a man's right?" And Maule, J., p. 335, observes: "When one speaks of a piece of paper as being an agreement, it seems that the paper is evidence of a right, and as a right cannot be the subject of larceny, neither is the paper which is the evidence of it." Where, however, the thing represented by the paper is not a mere right of contract or chose in action, but is a personal chattel, to the property and right of possession of which the party has a right to treat himself as entitled, the rule does not seem to apply. The thing to which the document has reference is per-

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sonal property, which may be stolen; and the words in which the rule is enunciated appear to us to treat such documents as not within the exception. The rule will be found laid down in the same, or nearly the same, words from the earliest time: (see Roscoe's Criminal Law by Power, 612, and the authorities there cited.) This rule is stated to be, that bonds, bills and notes which concern mere choses in action, were held at common law not to be such goods whereof felony might be committed, being of no intrinsic value, and not importing any property in possession of the party from whom they are taken. This clearly excludes from the rule documents of title importing property in possession of the party; and, remembering the former part of the rule as to documents of title so carefully confined to realty, we think that such documents of title to personalty cannot be considered within the rule. If it is a mere argument to deliver property not the party's own or not specific, it would, we think, be within the rule. It would rest in agreement, would confer a right of action only, and would be in every respect a chose in action. But we look at the pawnbroker's ticket as importing a property in possession. We had some doubt at first whether the party could be said to have the right to the property in possession, according to the meaning of the rule; but it is quite clear that the possession of the bailee or pawnee is the possession of the bailor or pawnor for the purpose of an indictment; and he has a right to lay the goods pawned or bailed as his goods, that is, as goods his property and in his possession. "Goods pawned," and the like, may be said to be the goods and chattels of the person to whom they are so entrusted, or of the owner at the option of the prosecutor: (see Jervis's Archbold, by Welsby, 14th edit. 34, where the authorities on this subject are collected.) We think, therefore, that we should be extending the rule further than we are warranted by an authority in doing, if we were to hold that it extended further than cases where the document concerns choses in action merely, and is only an agreement to deliver personal property not the party's own. And we think that in the present case the document relates to personal property to which the party is entitled, and that he is not the less entitled to the possession, because there is a lien which there is in so many cases of bailment, where such lien does not interfere with the right of property or possession, as far as concerns indictments. It should be observed that this construction by no means makes the provisions of the 7 & 8 Geo. 4, c. 29, useless, as that statute has the effect of making the stealing, which might otherwise be the stealing of a chattel of extremely small value, a stealing of a chattel of the like value as the value of the goods mentioned in the document; and as there may be cases of orders for the delivery of goods which import no property in any specific goods, and where the rights of the holder may only depend on a contract to deliver some goods, so that the document is in effect the evidence of a mere chose in action, and would not be the subject of larceny if not within the provisions of the statute. We should

add, that it would be very difficult to hold the present ticket not to be the subject of larceny, without overruling the case of *Reg. v. Doulton* (5 Cox Crim. Cas. 578), a decision in this court binding upon us. It was there held that a railway ticket in the usual form was a chattel, and the subject of an indictment for obtaining goods under false pretences. That, like the ticket in the present case, was in the nature of a token, and it evidenced the right of being carried on the railway without further charge; and it was more in the nature of a mere agreement, and of a document concerning a mere chose in action than the present, where it imported a right to personal property. The Court held it, however, to be a chattel, valuable as conferring the privilege of travelling without further payment. If the ticket in the present case be the subject of larceny, and not within the exception referred to, the description of a pawnbroker's ticket, or of a piece of paper, is clearly sufficient. For these reasons we think the conviction is right, and that it ought to be confirmed.

*Conviction confirmed.*

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1859.  
—  
*Larceny—  
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## COURT OF CRIMINAL APPEAL.

*April 30, 1859.*

(Before COCKBURN, C.J., ERLE and CROMPTON, JJ., BRAMWELL and WATSON, BB.)

REG. v. RICHMOND. (a)

*Felony — County Court process — Professing to act under colourable process — 9 & 10 Vict. c. 95, s. 57.**The prisoner had obtained a blank form (used in the County Courts Office for plaintiffs to fill in the particulars of the names, &c., as instructions for the issue of County Court summonses), which he filled up, and without authority signed it, "W. G., Registrar of the T. Court." On the back of it he wrote, "Unless the whole amount claimed by Mr. Alexander Richmond, draper, of T., is paid on Saturday, an execution warrant will be immediately issued against you. Witness my signature, W. G." This document the prisoner inclosed in an envelope, and sent by post to a person who was indebted to him, and whose wife, in consequence of the receipt, went to W. G., the registrar of the County Court, to pay the debt:**Held, that this was an acting, or professing to act, under false colour and pretence of process of the County Court, within the 9 & 10 Vict. c. 95, s. 57.*

CASE reserved by Watson, B.

The prisoner was tried before me at the last Somersetshire Assizes for an offence under the County Court Act, 9 & 10 Vict. c. 95, s. 57, in several counts, for acting and professing to act under false colour and pretence of process of the County Court of Somersetshire.

The prisoner had obtained blank forms for the plaintiff's instructions to issue a County Court summons, one of which he filled up, and, without any authority, signed it "William Giles, Registrar of the Taunton Court."

The form, as filled up, was as follows:—

"Plaintiff's instructions.

"(By authority.)

"No. of plaint, T 568.

"County Court of Somersetshire, at Taunton.

"Plaintiff's name in full—Alexander Richmond, for Mr. A. Carmichael, Exeter.

(b) Reported by J. THOMPSON, Esq., Barrister-at-Law.



"Plaintiff's residence and occupation—East-reach, Taunton, draper.

"Defendant's name in full—Thomas Snooks.

"Defendant's residence and occupation—Creech St. Michael, labourer.

"Amount claimed—9s. 6d.

"Nature of claim—Goods sold and delivered.

"Dated 6th September 1858.

"(Signed)

"WILLIAM GILES,  
"Registrar of the Taunton Court."

On the back of this form the prisoner wrote the following:—

"Unless the whole amount claimed by Mr. Alexander Richmond, draper, of Taunton, is paid on Saturday, an execution warrant will be immediately issued against you.

"Witness my signature,

"WILLIAM GILES."

The registrar of the court is named William Giles.

The signature on the face and back were forgeries.

This document the prisoner inclosed in an envelope, and sent it by post to the said Thomas Snooks at Creech St. Michael. The sum of 9s. 6d. was due from Thomas Snooks to the prisoner. The document was sent to Thomas Snooks to obtain payment of the said sum.

Snooks' wife went with the document (on receiving the same) to Mr. Giles, the registrar, to pay the money, who refused to receive it, and Mr. Giles saw the prisoner and charged him with the offence, who confessed his guilt in having so written and sent this document.

The words "By authority" printed on the document, referred to the form being issued by the authority of the authorities in London.

It was contended on the part of the prisoner that this was not an offence within the above provision, and the case of *Reg. v. Evans* (26 L. J. 92, M.C.), and particularly an observation of Lord Campbell, C.J., in delivering his judgment, were cited.

I reserved the point for the consideration of the Court of Criminal Appeal, and admitted prisoner to bail.

W. H. WATSON.

*F. Edwards*, for the prosecution.—The question depends on the 9 & 10 Vict. c. 95, s. 57, which enacts that "every person who shall forge the seal or any process of the court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons, or other process of the said court, knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process of the said court, shall be guilty of felony." The case of *Reg. v. Castle* (7 Cox Crim. Cas. 375), where a document which appeared

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on the face of it to be a mere notice to produce accounts on the trial of a cause, though headed "In the County Court of L.," and entitled in a cause in that court, was held not to purport to be any process of the County Court. The document sent by the prisoner was one regularly used in the registrar's office of the County Court by parties for the purpose of filling up their claims.

WATSON, B.—The counsel for the prisoner, in raising the objection, brought to my notice this observation of Lord Campbell, C.J., in *Reg. v. Evans* (26 L. J., 92, M.C.; 7 Cox Crim. Cas. 293):—"The mere sending the letter would not be acting contrary to the statute;" and in deference thereto I reserved this case.

Edwards.—This case falls within *Reg. v. Evans*, which decided that it is sufficient if the prisoner pretends to act under the process of the County Court, although in fact the document is not a County Court document. It was the intention of the Legislature to reach such a case as this, and certainly the prisoner was professing to act under false colour or pretence of process of the County Court:" (s. 57.) (He was then stopped by the Court.)

No counsel appeared for the prisoner.

COCKBURN, C.J.—We are all satisfied that the conviction ought to be affirmed.

CROMPTON, J.—The offence proved is clearly a professing to act under colourable process of the County Court.

BRAMWELL, B.—I consider myself bound by the authority of *Evans's* case, but I do not wish it to be understood that I have changed my opinion.

*Conviction affirmed.*

## COURT OF QUEEN'S BENCH.

May 7, 1859.

(Before Lord CAMPBELL, C.J., WIGHTMAN and HILL, JJ.)

HOUE (appellant) v. SMITH (respondent). (a)

*Hawkers Act, 50 Geo. 3, c. 41, ss. 7, 17—What constitutes a householder within the exemption in sect. 7.*

*The appellant, who lived at Knaresborough, sent drapery goods to Ripon for sale. A house was there taken by his agent, in which they were exposed for sale. The appellant not having a hawker's licence, an information was laid against him, and he was convicted, the justices being of opinion, notwithstanding the evidence (which they set out in the case), that he was not a householder or person having his usual place of abode in Ripon :*

*Held, that the evidence showed that he was a householder ; and that notwithstanding he may not have been a bona fide householder, but had taken the house merely to avoid taking out a licence, yet he was still a householder, and not liable therefore to be convicted.*

**T**HIS was a case stated for the opinion of the Court of Queen's Bench, upon a conviction of the appellant.

The appellant was convicted by certain justices at Ripon for an offence under the 50 Geo. 3, c. 41, s. 17, for trading as a hawker without having a licence. The case stated by the justices set out the evidence, which was in substance as follows :—The informant, a police-officer acting under the instructions of a Trade Protection Society, and being inspector of hawkers' and pedlars' licences at Ripon, had asked the defendant for his licence, when he said he had not got one ; that the goods were not his, and were consigned to one Kendrew ; and that one Foster was his apprentice ; but " we " paid the rent and rates.

A printer at Knaresborough proved that he had printed for the defendant on two occasions handbills, advertising, the one a " Peremptory Sale of Bankrupts' Stock at Kirkgate, Ripon ; " the other advertising a " Peremptory Sale of Drapery Goods at Knaresborough—T. Dobson's Assignment ; " but stated on cross-

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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—

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examination that he had previously printed a bill advertising a sale by auction by one Renton, on the 3rd of January, 1859, and following days, at the shop late occupied by Mr. J. Dobson, of the whole of his stock in trade.

A witness proved that he had been employed by Kendrew to take goods from Knaresborough to Ripon; and took them to a house at Kirkgate, Ripon, at the end of January last, and saw there Kendrew, and Foster, the defendant's apprentice.

A boy, aged 14, proved that he went to the shop in Kirkgate in February, and remained five weeks, and left when they did. He was engaged by Kendrew, who paid him the first Thursday; but Foster paid him for the remainder. The defendant came once or twice, and went into the back shop with the apprentice. Kendrew went away the day after witness went; and the goods were sent to the defendant's house at Knaresborough when the shop at Ripon was given up.

The landlord of an inn at Ripon proved that Kendrew came to his house in January, and that the apprentice above-mentioned came there a few days afterwards, and that they slept at the house from the 17th to the 28th of that month; that the apprentice said, when he left, that they were going to lodge at the public rooms; and that Kendrew had said something about not staying long, and borrowing a bedstead to put in the house.

It was also proved by one Sherwin that he let the house in Kirkgate on the 14th of January to Kendrew, when the defendant's name was not mentioned; that Kendrew first took the house for a fortnight, and paid a fortnight's rent in advance, but afterwards under an agreement, which, after reciting that he was a tenant, stated that the terms of the tenancy were:—The rent at the rate of 16*l.* per annum, payable monthly; the tenancy to be half-yearly, determinable by half year's notice by tenant or landlord; the tenant to pay taxes, and keep in repair. They left altogether on the 19th of February, Foster paying the rent (2*l.* 10*s.*), and the landlord had since let the house to other parties; but the witness stated on cross-examination that Foster complained that they could not make the place pay, and gave him 1*l.* beyond the rent to take the key and possession.

Finally, it was proved that the goods had been purchased at the shop, as laid in the information; and that all the goods were taken from the shop in Ripon, and returned to the defendant's shop at Knaresborough.

The remainder of the goods were then removed back to Knaresborough. Defendant himself was at the shop at Ripon very seldom. He had no hawker's licence.

The justices, at the conclusion of the case stated for this court, said:—"We the said justices, however, being unanimously of opinion that the said defendant Henry Houpe was not a householder or person having his usual place of abode in Ripon, and that the evidence given before us brought the case within the operation of the said stat. of 50 Geo. 3, c. 4, s. 17, gave our

determination against the said defendant (the appellant herein) in the manner before stated. The question of law arising on the above statement therefore is, whether the facts aforesaid do or do not constitute an offence within the meaning of the said statute under which the said information was laid."

Sect. 6 of the 50 Geo. 3, c. 41, describes who are hawkers within the meaning of the act

Sect. 7 enacts that it shall not be lawful for any hawker, &c., going from town to town, &c., and travelling either on foot or with horse or horses, either by opening a room or shop and exposing to sale any goods, &c., by retail in any town, parish, or place, such person not being a householder there, or the same not being an usual place of his or her abode, &c., to send or sell, &c.

Sect. 17 enacts that if any such hawker, &c., shall trade as aforesaid, without or contrary to, &c., such licence, he shall for every offence forfeit 10*l*.

*Bliss*, Q.C., now appeared in support of the conviction, and contended that the appellant had clearly brought himself within the penalty of the act, as being a hawker and not having a licence, and that although he might be said to be the occupier of the shop at Ripon, yet, as the occupation was merely colourable, and obviously to avoid taking out a licence, he could not escape the penalty; the justices inoreover having found as a fact that the appellant was not a householder, or person having his usual place of abode at Ripon. A cabinet-maker residing at L., who sent goods to A. in a cart, where he employed an auctioneer and sold the goods by auction, was held to be a person travelling from town to town within 50 Geo. 3, c. 41, s. 7: (*Attorney-General v. Woolhouse*, 1 Y. & J. 468; *Dean v. King*, 4 B. & Ald. 517.) Where a person selling without a hawker's licence set up that he was selling in a legally established market, it was held that if it was not a market created by grant he was to be arrested under 50 Geo. 3, c. 41, s. 20: (*Benjamin v. Andrews*, 27 L. J. M. C. 310.)

*Temple*, Q.C., was not called upon.

LORD CAMPBELL, C.J.—I am of opinion that the conviction should be quashed. What the justices probably mean by their finding is, that the appellant was not a *bona fide* householder, but had taken the house merely to evade taking out a licence under the Hawkers Act. It seems to me that they have adopted Mr. Bliss's argument, that if the house was taken to elude the statute, he was not a householder within the act. If, however, he was a householder at all, it is sufficient. I think there was no evidence upon which the justices were justified in coming to the conclusion that he was not a householder.

WIGHTMAN and HILL, JJ., concurred.

*Conviction quashed.*

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## COURT OF CRIMINAL APPEAL.

*May 7, 1859.*

(Before COCKBURN, C.J., ERLE and CROMPTON, JJ., BRAMWELL and WATSON, BB.)

REG. v. JOHN SIDEBOTHAM. (a)

*Manchester Local Improvement Act—Indictment for building houses with fronts facing each other within a prescribed distance—Street.**The Manchester Improvement Act, 8 & 9 Vict. c. cxli., s. 30, enacted that it should not be lawful to build any houses with their fronts facing each other which shall be separated from each other by a space less than twenty-four feet wide, excepting only on sites of houses built prior to the Act, and except on vacant plots in streets partially built upon on both sides.**A., the owner of land, built up to the boundary of his land, the same not being in a street, and some time afterwards the defendant, the owner of the land in front of the houses built by A., built a stable within the prohibited distance in sect. 30 in front of A.'s houses:**Held, that the defendant was not prevented from so doing by sect. 30, as that applied only to the erection of new streets.*

CASE for the opinion of the Court of Criminal Appeal:—

At the Manchester General City Sessions, holden before me on Monday, 22nd of November, 1858, John Sidebotham was tried and found guilty of a misdemeanor on the following indictment, that is to say:—

City of Manchester, } The jurors for our Lady the Queen  
in the County of Lancaster, } upon their oath present that, before  
to wit. } and at the time of the committing the  
offence hereinafter mentioned, there was, and still is, within the  
said city of Manchester, a certain house with the front facing into  
a certain street within the said city of Manchester called Wright-  
street, and that John Sidebotham, late of the city aforesaid, in the  
county of Lancaster, bricklayer, then and there well knowing the  
premises, on the 6th day of September, in the year of our Lord

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

1858, at the city aforesaid, in the county aforesaid, and within the jurisdiction of this court, unlawfully did erect and build within the said city and jurisdiction a certain other house—to wit, a stable—in such a position that the fronts of the said two houses face each other, and are separated from each other by a space of less than twenty-four feet wide. And the jurors aforesaid do say that the said house so unlawfully built and erected by the said John Sidebotham as aforesaid, has not, nor is, erected upon the sites or site of any houses or house built prior to the passing of a certain act of Parliament passed in the ninth year of the reign of Her Majesty Queen Victoria, entitled “An Act to effect Improvements in the Borough of Manchester, for the purpose of promoting the health of the Inhabitants thereof,” and that the said house so built by the said John Sidebotham as aforesaid, was not, nor is, built up to, or according to, or in continuation of, or within the line of any house or houses already existing in the said street, and that the same was and is built with its front much nearer to the front of the said first-mentioned house than the line of houses already existing on the opposite side of the said street, from the said first-mentioned house; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that before and at the time of the committing the offence hereinafter mentioned, there was, and still is, within the said city of Manchester, a certain house with the front facing into a certain street, within the said city, called Wright-street, and that the said John Sidebotham, late of the city aforesaid, in the county of Lancaster, then and there, well knowing the premises, on the 6th day of September, in the year of our Lord 1858, at the city aforesaid, in the county aforesaid, and within the jurisdiction of this court, unlawfully did erect and build within the said city and jurisdiction a certain other house, to wit a certain inclosure, to wit a wall, in such a position that the fronts of the said two houses face each other, and are separated from each other by a space of less than twenty-four feet wide. And the jurors aforesaid, upon their oath aforesaid, do say that the said house so unlawfully built and erected by the said John Sidebotham as aforesaid, has not, nor is, erected upon the sites or site of any houses or house built prior to the passing of a certain act of Parliament made and passed in the session of Parliament held in the eighth and ninth years of the reign of Her Majesty Queen Victoria, entitled “An Act to effect Improvements in the Borough of Manchester, for the purpose of promoting the health of the Inhabitants thereof,” and that the said house so built by the said John Sidebotham as aforesaid, was not, nor is, built up to, or according to, or in continuation of, or within the line of any house or houses already existing in the said street, and that the same was, and is, built with its front much nearer to the front of the said first-mentioned house than the line of the houses already existing on the opposite

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*statute.*

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*Misdemeanor  
—Building  
contrary to  
statute.*

side of the said street from the said first-mentioned house; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

In the year 1842 or 1843 a row of cottage houses was built in the township of Ardwick, in the city of Manchester. There was no evidence to show that the cottages had not been built up to the extreme limit of the land belonging to the owner of such cottages, except that he had made a flagged pavement in front of them of the width of 2ft. 6in. And the counsel for the prosecution stated, that for the purposes of the trial it might be assumed that they had been built up to such extreme limit. The cottages fronted due south as near as possible, running east and west. At the time these cottages were built, there was no house or building opposite to them; the whole of the land in front of them was vacant, that is, unbuilt upon. Seven or eight years ago the present owner (Mr. Welsh) purchased these cottages; they were then not all finished, but they are now, and at this time are all tenanted; and at the time Mr. Welsh purchased them, there was no wall or building opposite to them or any of them.

In front of the cottage at the west end of the row was written "Wright-street," but no steps whatever had been taken to make it a street repairable by the public.

The cottage at the west end of the row abutted towards the west upon a paved street, but such paving does not extend beyond the front line of the cottages; and the narrow flagged pavement in front of the cottages going eastward extends only round the corner of the cottage at the east end of the row, and to the back door of that cottage and no further, and there is no thoroughfare at all. The land to the east of the last-mentioned cottage belongs to the defendant; to the west, and in the direction of what is called Wright-street, there is a paved street which is only six yards and a half wide, and which has been paved by the town four or five years; the part so paved was an old street, and the town have not hitherto taken upon themselves to pave anything beyond the old street. After these cottages had been erected, and after they had become the property of Welsh as aforesaid, that is to say, about six years ago, the defendant purchased and became, and was and now is, the owner of the land whereon, in the month of September in the year 1858, he erected and built the stable complained of in the first count of this indictment, and also the wall complained of in the second count of the said indictment.

There was a model, but no plans, produced at the trial.

The defendant's wall complained of, at the south-west end thereof, commenced at Vance's coal-yard, and extended north-east till it joined the back wall of defendant's stable. The wall is 10ft. 9in. high, and the stable 18ft. 9in. high. Nearly twenty years ago there was a high paling seven or eight feet high, which, commencing where the south-west extremity of defendant's wall does, extended in the same direction and in the same line that the wall does, for 15ft. to the north-east, dividing Mr. Vance's land



from the land now the defendant's. That paling did not exist when defendant purchased this land, and there was no fence at all upon it then; at the end nearest Vance's coalyard it was higher by about 4ft. than the land on Vance's side, and the defendant's land gradually rose higher as it went towards where the stable is. The whole of the land of the defendant was cut sheer down, and there was no other mark to show its limit but the bank of earth. Some time ago the defendant lowered that portion of his ground adjoining to Mr. Vance's, until it was of about the same level as Vance's, and there being then no apparent boundary line between, Mr. Vance again put up paling where the old paling had been, to mark the boundary of his own property, and also to prevent the defendant going over his land. And the defendant afterwards, following the line of the paling Vance had so put up, built in September last the said wall, so complained of, on his own land.

As soon as ever the said wall crosses the line which I have marked as eight yards from the cottages, it gets within the prohibited distance from the front of such cottages, and as it goes on to the north-east, it gets gradually nearer to the cottages, until, at the point where it joins the back wall of the stable, it comes to within 2ft. 10in. of the front of the easternmost cottage; and a portion of the back wall of the stable, being of the length of 4ft. 7in. at the furthest point where it joins the said wall, is only 2ft. 10in. from the same cottage; and at the extreme east end of the same cottage the back wall of the stable is only 1ft. 10in. from the front of it. The door into the stable is from the defendant's own land, and there is no opening, by window or otherwise, in the back wall of the said stable.

I had great doubt whether either the wall or the stable which the defendant had clearly built within the prohibited distance of eight yards from the front of the said cottages, were such buildings as are contemplated by the 30th section of the said act; but it being considered that it was very desirable to have a construction put upon this most important act of Parliament by the Court of Criminal Appeal, I directed the jury that both wall and stable were such buildings as were so prohibited, at the same time telling them that that question would be reviewed by the Court of Criminal Appeal.

The jury found defendant guilty.

The question for the opinion of the Court is, whether that direction was right as to both or either of the buildings complained of.

The learned counsel for the defendant also contended that, even admitting that the defendant had broken the act of Parliament, it was not an indictable offence.

I held that if he had broken the law, he might be indicted for it; but I reserved that question also for the opinion of the Court of Criminal Appeal.

R. B. ARMSTRONG,

Recorder of Manchester.

The Manchester Improvement Act, 8 & 9 Vict. c. cxli., is entitled  
VCL. VIII.

P

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—  
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—  
*Misdemeanor*  
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contrary to  
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Misdemeanor  
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“An Act to effect Improvements in the Borough of Manchester, for the purpose of promoting the health of the Inhabitants thereof.”

Sect. 18. For the purpose of effecting sanitary improvements, empowers the town council to enter upon houses, lands, &c., purchasing and making compensation therefor.

Sect. 29. No street to be laid out of less width than twenty-four feet.

Sect. 30. And be it enacted, that it shall not be lawful to build within the borough any houses with their fronts facing each other, which shall be separated from each other by a space of less than twenty-four feet wide, excepting only in cases where such houses shall be erected upon the sites of houses built prior to the passing of this Act, and excepting also in cases where vacant plots of land may exist in streets already partially built upon on both sides, in which latter case it shall be lawful to build up to the line of the houses already existing in any such streets.

Sect. 31. Regulating height of houses in certain streets.

Sect. 32. Front entrances not to be opened into certain streets.

Sect. 33. Owner to give notice to town clerk before laying out street.

Sect. 34. Town council to make regulations as to level of streets.

Sect. 35. Town council may alter level, if made contrary to regulations, at expense of owners.

Sect. 36. Town council may alter level of existing, or future streets, sewers, &c., at the cost of the mayor, aldermen, and burgesses.

Sect. 37. If houses, &c., injured by altering level of streets, town council to make compensation to owners and occupiers.

Dr. *Wheeler* (*Hopwood* with him) for the defendant.—The question arises on the construction of the words, “that it shall not be lawful to build any houses with their fronts facing each other,” in sect. 30. This was not a “street” properly so called. It is a case where an owner of land having built up to the boundary of his own land, says to the owner of the land adjoining the front of the land so built upon, “You cannot under this act build any houses facing mine, without you leave a space of twenty-four feet vacant on your land.” This Act must be construed with reference to the rights of owners of property, as well as with reference to sanitary purposes, and the 30th section ought not to be so construed, as to enable one man so to build as to deprive his neighbour of so much of his property as he would do in the case above supposed. [WATSON, B.—It seems to me that sect. 30 only applies to building new streets.] Yes; and this was not a street, for the case finds that it is not a thoroughfare. [CROMPTON, J.—The section says it shall not be lawful to build any houses with their fronts facing each other; it does not say to build houses with their fronts facing the houses of another party.]

*Monk*, for the prosecution.—This act was passed for sanitary purposes, and the stable in question obstructs the passage of the air through this street, which was intended for human habitation.

This stable is a house within the meaning of the interpretation clause. The word "front" in sect. 30 means that portion of the house which comes into the street. [CROMPTON, J.—In the same sense as you speak of "frontage ground."] Yes; in that sense the back of the stable is within the meaning of sect. 30. That section does not apply merely to streets newly laid out, for it speaks of building on old sites. If A. builds nearly to the extremity of his own land, it seems strong to say that his opposite neighbour shall not enjoy the same rights, but it is submitted sect. 30 so enacts. Sect. 18 favours this view. [COCKBURN, C.J.—Unless this is a street your argument will not apply. How can you make this out to be a street? CROMPTON, J.—I am not satisfied that this is within the words of the section.] The interpretation clause enacts that the singular shall include the plural, and *vice versa*. You may therefore read "houses" as "house," and "each other" as "another." [CROMPTON, J.—You may change "houses" to "house," but "each other" must mean "two."]

COCKBURN, C.J.—I am of opinion that the conviction in this case cannot be sustained. The question all turns on the 30th section of the Manchester Improvement Act, 8 & 9 Vict. c. cxli, which is an Act to effect improvements in the Borough of Manchester, and for the purpose of promoting the health of the inhabitants thereof. Now *prima facie* the language of the section makes it an offence only where a person builds, or two persons conjointly build houses at the same time, with their fronts concurrently built facing each other. If the back of a house was then made to face the front of the opposite house, I do not say whether that might not fall within the section. But *prima facie* the houses must be built practically at one and the same time, to come within the 30th section. We were pressed, in the ingenious argument of Mr. Monk, to look at the interpretation clause, which says that words importing the singular number shall include the plural number, and *vice versa*; and he contended that the defendant was brought within sect. 30, inasmuch as the word "houses" might be read "house;" and that the words "each other" might be read "another." We, however, can only apply the interpretation clause where it is clear that the substantial enactment was intended to apply to "house" in the singular number as well as in the plural; and, when the context is looked at, I do not think that that was intended. Sect. 30 is only one of a group of sections for making and laying out streets, and it is very plain that this is not a street in any acceptation of the term. Mr. Monk was constrained to admit that, if a man built a single house only in a field, the consequence of his view would be that it would prevent another person building a stable within the prescribed distance. The intention of sect. 30 was pointed to the laying out and building of streets, and it does not appear that the offence charged took place in a street at all. It did not lead any way—it was not a thoroughfare, and was only used as an occupation way. In order to put such a construction on the section, we must change the

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words of the section from "houses facing each other" to "house facing another;" and it is quite clear that we should not be warranted in doing that, and that if we did we should be interfering with the rights of parties in a way that the act would not justify.

The rest of the Court concurring,

*Conviction quashed.*

## COURT OF QUEEN'S BENCH.

June 11, 1859.

(Before Lord CAMPBELL, C.J., WIGHTMAN, ERLE and CROMPTON, JJ.)

REG. v. EDMUNDSON. (a)

*Conviction—Master and servant—Possession of goods suspected to have been embezzled—17 Geo. 3, c. 56—Warehouse.*

*The 17 Geo. 3, c. 56, which relates to the unlawfully disposing of materials entrusted by masters to workmen to work up in their trades, by sect. 10 enacts, that if any such materials mixed or unmixed, wrought or unwrought, suspected to be purloined or embezzled, shall be found in any "dwelling-house, out-house, yard, garden, or other place or places," the person in whose house, &c., the same shall be found, if such person shall not give an account to the satisfaction of the justices how he came by the same, shall be guilty of a misdemeanor:*

*Held, that a warehouse, though not attached to or within a curtilage of a dwelling-house, was within the section.*

WELSBY, on a former day, obtained a rule *nisi* for a *certiorari* to quash a conviction by a stipendiary magistrate for the city of Manchester.

The defendant was convicted under the 17 Geo. 3, c. 56, ss. 10, 14, of a misdemeanor in unlawfully having in his possession, on his premises in a warehouse in Manchester, materials used in the woollen manufacture, suspected to be purloined and embezzled, and not producing before the magistrate the persons entitled to dispose of the same, or giving an account to the satisfaction of the magistrate of how he came by them.

(a) Reported by J. THOMPSON, Esq., Barrister at-Law.

The goods were seized by an inspector, without a search-warrant, at a warehouse of the defendant's, being one of the flats in one of the large buildings in Market-street, Manchester. The defendant did not reside there, but used the place for the sale, on commission, of goods openly exposed for sale, and a very small part only of his stock consisted of unmanufactured materials.

The rule was obtained, on the ground that the warehouse was not one of the places mentioned in sect. 10, and, therefore, that the defendant had not committed the offence of which he was convicted.

The 17 Geo. 3, c. 56, is an act to amend to amend the laws for preventing fraud and abuses by persons in the hat manufacture, and in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair and silk manufactures, and for making provisions to prevent frauds by journeymen dyers.

Sect. 1. recites that by the 22 Geo. 2, c. 56, for the more effectually preventing of frauds and abuses by persons employed in the manufacture of hats and in the woollen and silk manufacture, it was enacted that if any person who should be hired or employed, &c., to make or to prepare or work up any woollen, &c., or silk manufactures, should purloin, embezzle, secrete, &c., or unlawfully dispose of any of the materials with which he should be entrusted, upon conviction he should be liable to imprisonment and whipping. This section then repealed the punishment prescribed by the 22 Geo. 2, and substituted a nearly similar punishment.

Sect. 10, after reciting that it frequently happens that materials used in the manufactures before mentioned are found or known to be concealed in the possession of persons who have received the same, knowing them to be purloined or embezzled, or of persons known not to be entitled to dispose of the same, &c.; and that it would tend to the discouragement and suppression of such offences if the discovery and conviction of such offenders were rendered more easy; enacts, that it shall be lawful for two justices, upon complaint upon oath that there is cause to suspect that any such purloined or embezzled materials are concealed "in any dwelling-house, outhouse, yard, garden or other place or places, to issue a search-warrant, and if any such materials suspected to be purloined or embezzled shall be found therein, to cause the same and the person or persons in whose "house, outhouse, yard, garden or other place," the same shall be found, to be brought before them, and if the said person or persons shall not give an account to the satisfaction of such justices, how he, she or they came by the same, then the said person or persons so offending shall be deemed and adjudged guilty of a misdemeanor, and shall be punished in manner hereinafter mentioned, although no proof shall be given to whom such materials belong.

Sect. 14. Every person adjudged guilty of a misdemeanor in having in his possession any materials suspected to be purloined or embezzled, and not producing the party or parties being duly

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entitled to dispose of the same, of whom he bought or received the same, nor giving a satisfactory account how he came by the same, &c., shall forfeit for the first offence 20*l.*, for the second offence 30*l.*, and for every subsequent offence 40*l.*, &c. &c.

*Edward James (Leresche with him).*—The conviction of the defendant is not invalidated by reason of the goods having been seized by the inspector without a search-warrant. That was so ruled by Tindal, C.J., in *Davis v. Nest* (6 C. & P. 167), which was an action for a trespass for breaking and entering the plaintiff's house, the defendant in so doing having professed to act under the statute in question, 17 Geo. 3, c. 56. It was there held that if goods of a description liable to be condemned under 17 Geo. 3, c. 56, are found in a house, magistrates have jurisdiction to condemn them under the statute, and to convict the party, although the goods are not found on the execution of a search-warrant previously granted. Secondly, a warehouse is a place *ejusdem generis* as those mentioned in sect. 10: (*Harris' case*, East's P. C. 450; *Rossel v. Kitchen*, 1 Burr. 497; *Lowther v. The Earl of Radnor*, 8 East, 113.)

*Welsby and Fearnley*, in support of the rule.—The statute 22 Geo. 2, c. 27, and 17 Geo. 3, c. 56, were made with reference to servants and persons employed by the manufacturers who embezzled their masters' materials. The defendant was not a person of that kind, but a person who sold goods on commission. These goods were found in his warehouse, which was not a dwelling-house or a place of the same kind. The provisions of the statute 17 Geo. 3, c. 56, all point to places connected with a dwelling-house or shop in which materials are to be worked up. The words "other place," in sect. 10, mean *ejusdem generis* "as outhouse, yard or garden" within the curtilage of the dwelling-house. There is no case in which a conviction has taken place under this statute, except where goods have been found in a dwelling house: (*Rex v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630; *Sandiman v. Breach*, 7 B. & C. 96; *Fordyce v. Brydges*, 3 H. L. 1; *Re Boothroyd*, 15 M. & W. 1; *Reg. v. Dickenson*, 26 L. J. 204, M.C.)

Lord CAMPBELL, C.J.—We have to consider whether the magistrates were acting within their jurisdiction, and Mr. Welsby very fairly admits they were so acting, if a warehouse can be considered a place within the 10th section. I coincide in the principle that where general words of description follow special words of description in an enactment, the general words must be confined to things *ejusdem generis*. But I think a warehouse is a place *ejusdem generis* with buildings, and a place of the same kind as "dwelling-house, outhouse, yard, garden," mentioned in sect. 10. If such goods were found in an outhouse, I do not think it would cease to be an offence within the act, if the outhouse were a few paces beyond the wall which surrounds the dwelling house. The offence is made a misdemeanor by sect. 10, which is aimed at the receivers of stolen goods; and when stolen goods are found in the possession of any one, the act casts the burden on the possessor of showing that they have been honestly come by.

WIGHTMAN, J.—So far as I have heard this case, I think this was an offence clearly within the meaning of the section.

ERLE, J.—I also think that the conviction was right. The question is, does a warehouse fall within “other place” of the same kind mentioned in sect. 10? In determining whether a case falls within a class specified according to the purpose and view of the Legislature, we are not to consider the question as if it related to the imposition of a rate, or a matter of that sort, but the statute should be construed with reference to the evil which existed when the Act passed, and the remedy intended to be provided. The statute in the recitals shows how the materials for manufacture stolen or purloined may lose their character, and become incapable of being identified, and casts on a suspected possessor the duty of accounting for the way in which they got into his possession. A warehouse is a place peculiarly suited for the reception of large quantities of goods purloined or stolen like these, and if warehouses and shops where goods of the kind might be concealed are not within the act, dangerous temptations for the receipt of such goods would be held out. It was said in the course of argument that warehouses and shops may have been intended to be exempted from the act; but if so, receivers of stolen goods have only to take such places, and set this Act at defiance.

CROMPTON, J.—I have not heard the whole of the case, but, as far as I have heard, I agree with the rest of the Court. I heard Mr. Welsby move for the rule *nisi*, and then I did not think that there was very much in the point. (a)

*Rule discharged.*

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(a) Wightman and Crompton, JJ., had been in attendance at the House of Lords, and only came into court during the argument in support of the rule.

## Ireland.

## COURT OF QUEEN'S BENCH.

January 29, 1859.

(Before LEFROY, C.J., PERRIN and O'BRIEN, JJ.)

REG. v. MAGILL (a).

*Certiorari—Right of way—Indictment—View jury.*

*An indictment having been found against a party for the obstruction of an alleged right of way, defendant applied for a writ of certiorari, to remove said indictment from the criminal to the civil side of the court. The writ was granted, on the ground that a view jury was absolutely necessary in a case of this kind.*

THIS case came before the court on a motion on the part of the defendant to make absolute the conditional order for the issuing of a writ of *certiorari* (which had been obtained on the 17th of November, 1858), to remove into the Queen's Bench an indictment, found at the last Summer Assizes for the county of Antrim, against the defendant, for obstructing certain highways, footways, and driftways, leading into or over certain lands, part of the Cave Hill, "on the ground that the trial of the issue in the said indictment will involve certain difficult, novel, and important questions of law," and that the said indictment having been preferred at the instance of certain persons, inhabitants of the county of Antrim, calling themselves "An Association for the protection of Public Right of Way in and around Belfast," all or some of whom are liable and likely to serve as jurors at the assizes for the said county, the said defendant cannot have a fair and impartial trial of such issue.

*Brewster, Q.C.*, submitted that the court had full power to change the indictment to a different county, to have it tried at *Nisi Prius* as a civil action, when the case involves serious questions of law, and when parties would not have a fair and impartial trial in the county in which the indictment was found. The real question in this case is, whether the inhabitants of Belfast and the

(a) We are indebted to *The Irish Jurist* for the report of this case.



neighbourhood have a right to go over the whole property of the defendant; not that it is a right of way, but whether it is a common or not. A special jury can be struck, if the indictment is removed, to try that important question, which is not a criminal proceeding, but merely the assertion of a public right, and it is under this form of proceeding—that is the proper way to assert that right. I can find no case like the present. This is not to change the venue, but only an application for a *certiorari* to change the case from the criminal to the civil side of the court.

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*Macdonogh, Q.C.* (with him *Joy, Q.C.*, and *M. Harrison.*)—The other side are under a mistake in this case, for a private individual cannot bring an action for obstructing a right of way, such as is at present in question. The property in dispute never belonged to the defendant, but to Lord Donegal. The real question in this case is, whether or not a public right of way does exist over the Cave Hill. Magill prevented the people going over the hill. What are the grounds that a *certiorari* can issue on the part of defendant to change an indictment from criminal to civil side? In England the court will not grant a *certiorari* on an affidavit that defendant was advised that difficult points of law might arise, but the points of law should be stated: (*Rex v. Harrison*, 1 Chit. Rep. 571.) By a recent act of Parliament a judge may reserve a case tried at the Assizes for the Court of Criminal Appeal if he has any difficulty in deciding it. The affidavit in this case only states that he is “advised and believes.” The necessity of having a special jury is not alone sufficient cause for granting this motion: (*Reg. v. Greene*, 1 Wil. Woll. & Hod. Rep. 35.) The defendant must state the specific grounds on which legal difficulties will occur: (*Rex v. Joule*, 4 A. & E., O.S., 539.) Counsel also cited *Rex v. Meade* (3 Dowl. & Ry. 301); *Rex v. Templar* (1 Ne. & Per. 91); *Rex v. Fellows* (1 Har. & Woll. 641).

*Joy, Q.C.* (same side.)—In a case such as this a view jury is necessary, and this application is only preliminary to one for changing the venue to Dublin. The object of the defendant is to avoid the possibility of having a view jury.

LEFROY, C.J.—The only difficulty we feel upon the authorities is that about the special jury; and the necessity, as stated in the affidavits, of a view jury, shows that the case ought not to be determined by a criminal tribunal, for if tried before the latter there would be no opportunity of having a view jury.

*Order made absolute.*

*Geraghty* for the plaintiff.

*Cassidy* and *Bruce* for the defendant.

## Ireland.

## COURT OF QUEEN'S BENCH.

CROWN SIDE.

May 7, 1859.

(Before LEFROY, C.J., PERRIN and HAYES, JJ.)

IN THE MATTER OF THE TRUSTEES OF THE WILL OF JOHN C. KEARNEY, DECEASED, ACTING FOR AND ON BEHALF OF THOMAS C. KEARNEY, AN INFANT, AND A CERTAIN PRESENTMENT PASSED BY THE GRAND JURY OF THE COUNTY OF CORK, AT THE SUMMER ASSIZES, 1858. (a)

*Certiorari—Presentment—Grand Jury Act, 6 & 7 Will. 4, c. 116—Jurisdiction—Bridge—Public Road—Acquiescence—Traverse for damages.*

*Where a presentment for the raising of public money for the purpose of building a bridge has passed the grand jury in the usual way, and afterwards been acted on, and some of the money actually raised thereunder, a motion for a writ of certiorari to remove such presentment into this court to have same quashed, at the instance of a party who has traversed for damages, but has withdrawn that proceeding and has acquiesced for some time, will be refused.*

THIS was a motion to show cause against a conditional order for a *certiorari* to remove into this court a certain presentment passed by the grand jury of the county of Cork, at the summer assizes, 1858, for the construction of a timber bridge over the Bandon river, at Tisasson, in the said county. The conditional order had been obtained on motion of counsel on behalf of Thomas Franks and Abraham Thomas Foster, the surviving

(a) We are indebted to *The Irish Jurist* for a report of this case.

trustees of the will of John Cuthbert Kearney, deceased, acting for and on behalf of Thomas Cuthbert Kearney, an infant, and by it the Court ordered that a writ of *certiorari* do issue, directed to the justices of assize of the county Cork, and to the clerk of the Crown of the said county, to remove into this court a certain presentment of the grand jury of the county of Cork, passed at the Summer Assizes, 1858, whereby the sum of 2350*l.* was presented to be raised off the said county at large, and 1500*l.* off the barony of Kinsale, and 900*l.* off the barony of Courceys, for the purpose of building a timber bridge, with a portcullis and causeway, over the Bandon river, at Tissasson, on the road from Kinsale to Courceys country, between the lands of Tissasson at the Kinsale side, and the lands of Kilmaclona at the Courceys side, together with the application to the presentment sessions, and all other documents and things touching the same, in order that the said presentment might be quashed on the grounds that the said grand jury had no legal power or authority to make the said presentment under either of the acts of Parliament, or the sections, or any of the sections thereof, in the said presentment referred to, and on the grounds that the said presentment was illegal for the construction of said bridge, there being in truth and in fact no such road as mentioned and described in said presentment in existence, and the fact and truth being that there did not exist at the time said presentment was made, nor now, any road whatever at either side of the said river upon the land on which it was and is by said presentment proposed that the said bridge should abut; and also on the ground that the bridge, for the erection of which said presentment was passed, would be an illegal interference with the rights of said minor, and with his property in the ferry over said Bandon river; and because the proposed bridge cannot be constructed without the sanction of a special act of Parliament for that purpose, unless cause should be shown in the usual way.

It appeared from the affidavit made to ground the motion for the conditional order, that applications for said presentment were made at a presentment sessions, held at Kinsale for the said barony of Kinsale, on the 8th of January, 1858, and also at a presentment sessions held at Ballinspittle, in said barony of Courceys, on the 21st of January, 1858, and having been at each place respectively approved and adopted, they were submitted to the grand jury at the Spring Assizes, 1858, when the same were respited, and after being again submitted to said respective presentment sessions, were brought before the grand jury at the Cork Summer Assizes for 1858, and finally approved and fiat. It appeared that by letters patent of the 13th of January, in the 7th year of the reign of King William the Third, his Majesty granted to James Roche, his heirs and assigns, the several lands and ferries therein named, and amongst them the ferry of Kinsale, in the said county, to hold with its rights, members, and appurtenances, unto the said James Roche, his heirs and assigns, for ever, to be held of the King in

IN THE  
MATTER OF  
KEARNEY.

1859.

*Certiorari—  
Presentment—  
Jurisdiction.*

IN THE  
MATTER OF  
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free and common soccage, subject to the payment of the yearly rent of 4*l.* 10*s.* sterling. That all the estate and interest of Roche by various mesne assignments, became vested in the year 1839 in John Cuthbert Kearney, and his heirs. That John Cuthbert Kearney, by his will of the 16th of November, 1844, devised all his estates, including the said ferry, unto and to the use of the trustees therein named, upon the trusts therein mentioned: and that from the events which have happened, Thomas Cuthbert Kearney, the younger, who is under the age of twenty-one years, is now entitled to an estate tail in the said ferry and other estates so devised by the will of the said Thomas Kearney, deceased. This ferry is the only mode by which the Bandon river is crossed by cattle, &c., for several miles up from the sea. The ferry has been worth 100*l.* per annum for ten or fifteen years. The bridge will take away all traffic from it. That no road exists at either side which it is the object of the intended bridge to unite, and that therefore the grand jury had no power to make the presentment. By the affidavits filed as cause, it appeared that the proposed bridge was a matter of public utility and necessity. The parties now opposing only claimed damages at the time of the application to the Presentment Sessions for the injury to the toll, and they traversed for damages at the Summer Assizes of 1858, which traverse was afterwards withdrawn, or rather nilled at the Spring Assizes, 1859, there having been no appearance for said trustees. It further appeared that the said bridge had not been commenced, but the contract for the building thereof had been duly entered into, and that the contractor had gone to great expense in preparing timber and ironwork for said bridge, which was then ready, and that he was about to commence building when these proceedings were instituted, and that the contractor had already expended large sums in labour, &c., on the bridge before the making of the conditional order in this case, upon the faith of said presentment, and believing same to be valid, which would be lost to him if the presentment was set aside; and that he had no notice from the trustees or any person acting for them not to proceed with said works.

Several affidavits showed it to be a work of necessity, and no injury to the ferry.

About 1500*l.* had been raised by subscription to part defray the expense.

*Deasy*, Serjt., Q.C. (with him *O'Reardon*) shows cause.—No objection was made at the time of the passing of the presentment by the sessions, nor at the subsequent assizes. The legality of this presentment was admitted by these parties on their traversing for damages at the summer assizes, 1858. As a general rule this court will not go behind a presentment: (*Ex parte Henn*, 6 I. C. L. 239.) In that case the application was refused on the grounds that the parties had lain by and acquiesced for a long period, as here. The Chief Justice in giving judgment in that case said—"It is said that everything done may be shown to be null and void *ab initio*—that the presentment sessions have not done their duty; that

the grand jury have not done their duty; nay, that the judge himself has not done his duty; and that after the presentment has passed all these tribunals, it is to be reopened, and the things done under it set aside. If that doctrine hold good, I do not know who will ever undertake a contract, if after he has expended his money he is to be deprived of the benefit of that outlay, and all the proceedings to levy the money be avoided. I know nothing more likely to produce litigation." It was a question for the presentment sessions to have proved to their satisfaction, whether there was a road leading to the site of the proposed bridge or not, and the sessions having decided on that point, this court will not go behind their decision to inquire into that matter. [PERRIN, J.—Has not some of the money been levied under this presentment?] There has. In case of acquiescence by all parties for some time, this court will not, on motion to quash the presentment, attend to objections as to the insufficiency of the affidavit or estimate on which the presentment was founded: (*The Queen v. McKay*, 2 I. L. 16.) What is to become of the money which has been levied, and that which has been raised by subscription? If this conditional order is to be made absolute, that levy will have been illegal, and the parties who received that money will become liable to an action. Should this bridge be built it will be no disturbance to the ferry. If there existed an exclusive ferry from A and B, it does not prevent persons from going by any other boat from A direct to C, though it lie near to B, provided it be not done fraudulently, and as a pretence for avoiding the regular ferry: (*Tripp v. Frank*, 4 T. R. 666; *Huzzey v. Field*, 2 Crompt. Mee. & Ros. 432.) The Bandon family have not a grant of all the ferries on this river. The Court will discharge the conditional order.

*Fitzgibbon*, Q.C. (with him *W. A. Exham*), contra.—This court will not bind a minor by the acquiescence of his trustee. The traverse for damages at the summer assizes for Cork was withdrawn, as by the 134th section of the Grand Jury Act such a traverse does not lie in a case of this nature. This is not a legal presentment by the 56th section of the Grand Jury Act; it appears that the grand jury have no power to build this bridge without an act of Parliament to enable them. In the case of *In re Henn*, cited on the other side, the application was refused because the application was made in consequence of an informality in the proceedings; but there the grand jury had original power and jurisdiction under the act to make the presentment, which they had not here. There is no road, in fact, to the site of the proposed bridge; a road was commenced in 1846, but it is not shown ever to have been finished. This presentment is void; the 127th section of the Grand Jury Act has not been complied with.

*Exham* not called on.

*H. P. Jellett* appeared for the contractor.

*LEFROY*, C.J.—What right has the minor to stand in this court except through his trustees who have the legal estate? and he is bound by their acquiescence. Shall we now be brought into

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action to issue this writ of *certiorari*, to open up the whole of this presentment, which has been regularly acted on, and some of the money raised thereunder? We are not now to be called on to disturb all which has been done, the parties having looked on so long, and admitted, by their traverse, the legality of this presentment. We are acting upon the well known common-law principle, *vigilantibus et non domientibus jura subveniunt*, and we must refuse this application and allow the cause shown against making absolute the conditional order; but we think it is not a case for costs.

Attorney for the trustees—R. Meade and Son.

Attorney for the applicants—Sylvester Gill Austin Morrisson.

Attorney for the contractor—Wm. Beamish Gillman.

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## Scotland.

### HIGH COURT OF JUSTICIARY.

June 21, 1858.

REG. v. CHARLES SWEENIE. (a)

*Rape—Force, how far necessary—Connection with woman asleep.*

*S. was indicted for rape, and the evidence was, that he went into the bed where D.'s wife was asleep, and had connection with her, while she was asleep.*

*Held, that S. was not guilty of rape, inasmuch as such a crime implies that some force has been used to overcome the opposing will of the prosecutrix, and here no force was in fact used.*

*But held, by Lord President Macneill and Lord Ivory (who dissented), that the force essential to the crime of rape is relative to the resistance offered, and where there is no resistance to be overcome, it is not necessary to prove the use of force.*

**T**HIS was an indictment for rape. The indictment thus charged the offence:—"In so far as on the night of the 16th, or the morning of the 17th day of March, 1858, or on one or other of the days of that month, or of February immediately preceding, within the house situated in or near Bellshill, in the parish of Bothwell, andshire of Lanark, then and now or lately residing there, you, the said Charles Sweeney, did wickedly and feloniously invade by stealth the bed in the said house in which Catherine Devine, wife of, and now or lately residing with George Devine, wire-worker, in or near Blackboy Close, Gallowgate, in or near Glasgow, was then asleep, and did lie down beside her, and did attack and assault her, and did bring your naked person in contact with her naked person, and did introduce your private member into her private parts, and did have carnal knowledge of her when asleep, and without her consent did ravish her."

The counsel for the prisoner objected to the relevancy of the indictment, i.e. demurred on the ground that the facts set forth did not amount to rape. That there was no allegation of force or

(a) Reported by J. PATERSON, Esq., Barrister-at-Law, *ex relatione*.

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violence, which was of the essence of the crime: (1 Hume's Crim. L. 301; Alison's Prin. 209; Hawkins' P. C. b. i, c. 41, s. 1; 4 Bl. Com. 210; 1 East P. C. 434; 1 Russ. Crimes, by Greaves, 675.) Moreover, that it was doubtful whether it was possible for a man to have connection with a woman, unknown to her, in natural sleep: (Taylor's Med. Jur. 654, 5th edit.; Smith's Forens. Med.; Beck's Med. Jur. 169; Paris's Med. Jur.; Wharton & Stillies Med. Jur. 336, Philadelphia, 1855; Montgomery on the Signs and Symptoms of Pregnancy, 361, 2nd edit.; Brendelius, 96—9; Capuron, Médecine Légale relative aux Accouchements, 57, 84; Etude Medico-Légale sur les attentats aux Mœurs, par Alphonse Tardieu, Paris, 1858; Sedillot, Manuel Complet de Médecine Légale, Bruxelles, 1833, p. 31—32; Briand, Manuel Complet de Médecine Légale, Paris, 5th edit. 1852.)

The Judges, having differed in opinion, delivered their opinions *seriatim*, as follows:—

LORD ARDMILLAN.—I have felt this case to be attended with great difficulty, and have anxiously considered it both on the authorities and on principle, but I shall not detain your lordships by stating my opinion at any length. We have here to deal only with relevancy. The public prosecutor offers to establish by evidence the facts which he avers. They may seem very improbable; with that we have no concern. Our part is to decide whether, if the facts as here alleged are proved, they amount to rape. I have, after much hesitation, arrived at the conclusion that the facts alleged do not amount to that crime. I am of opinion that force, actual or constructive, is an essential element in the crime of rape; that any mode of overpowering the will without actual personal violence, such as the use of threats or drugs, is force in the estimation of law; and that any degree of force is sufficient in law to constitute the crime of rape, if it is sufficient in fact to overcome the opposing will of the woman, but it must be force employed to overcome the will; and I do not concur in the proposition maintained by the prosecutor, that the mere bodily contact necessarily implied in the act of connection is sufficient force to satisfy the legal definition. There is, I think, no authority for such a proposition, and on principle it does not commend itself to my mind. In the case of a child, and perhaps also in some peculiar cases of insanity or imbecility, the law holds such persons to have no will in the matter of connection, and the act in such case, though not actually forcible, is forcible in the estimation of the law, according to the opinion of Baron Hume. Accordingly the element of force as applied to the overpowering of the will is introduced by long settled legal presumption in every case of connection with a child. It is a presumption which cannot be redargued; no proof of consent can set it aside; and the act of connection with a child is, in consequence of that presumption, uniformly and necessarily the crime of rape, not in respect of any lowering or modifying of the requisites of the crime, but in respect of that legal presumption which gathers from the infancy of the victim the force necessary



to the definition of the crime. Except in the case of a child, actual force, or the use of means of overpowering the will equivalent to actual force, is, in my opinion, necessary to the crime of rape. In no case, that I am aware of, has there ever been a charge of rape sustained without the element of such actual force or its equivalent, except in the case of a child. In the case of a child the element of force is introduced by legal presumption, but in that case also the act amounts to rape because in the eye of the law it is a forcible act; and thus the definition of the crime remains unimpaired. Now, if I am right in holding that the definition of rape is not satisfied, as regards the element of force, by the mere bodily contact implied in every act of connection, then in the case before us there is no averment of force, actual or constructive, and none can enter into the act charged, unless we are prepared to introduce it by force of a legal presumption. No such presumption in the case of a sleeping woman has yet been recognised by law. It does not, like the presumption in the case of a child, rest on the basis of undivided institutional authority, and of uniform judicial recognition. It is a new presumption never hitherto recognised, and though it may perhaps not be unreasonable, and there may be some affinities and analogies to support it, yet I am not prepared for the first time to establish it by our decision. Without such a presumption to introduce the element of force, it appears to me that the act here charged cannot be tried as rape.

Lord IVORY.—I have had great difficulty in forming an opinion, and that which I have formed I express with much hesitation. It is, moreover, an opinion different from the one I entertained when the case was first submitted to me. My opinion is that there is enough set forth to constitute the crime of rape. The definitions in the books are no doubt the having possession of the woman's person "forcibly and against her will," but this definition cannot apply to the circumstances of the present case, where there could not be the resistance implied in the definition. There was no need of force for there was no resistance to overcome. It could not be against the will, because the will could not be exercised. The soundest definition of rape is that given by Lord Cockburn, *i.e.*, "having intercourse without the woman's consent," and "where consent cannot in the circumstances be had, the law presumes rape." It is the absence of consent that constitutes the essential element in rape. Why is it that, in the case of children and of insane persons, the law says that rape is committed? Because it holds that in these cases no consent can be obtained; and therefore it is "the absence of consent," and not "the employment of force" that the law chiefly regards. The presence of consent on the part of the woman is necessary to prevent criminality. The law holds that if that consent had not been obtained, positive force would have been necessary had she been conscious; and it introduces in every case constructive force when she is in such a condition that positive force is not required. If we hold that this is not rape there are many cases of a most serious kind which we will not be able to

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touch. It will effect a most unwise loosening of our law as regards this crime, and will imperil the whole progress that has been made as to the doctrine of constructive force.

Lord COWAN.—I have approached the consideration of this question as one of extreme delicacy and one not unattended with difficulty, and I am of opinion that the facts as stated in this indictment do not amount to the crime of rape. It is of the essence of the crime of rape that carnal knowledge of the woman's person should be had forcibly and without her consent—in other words, by the adverse will of the woman to the act being overcome by force on the part of the ravisher. It is this that constitutes the crime according to all the authorities; and nothing short of it will support the charge. A distinction is alleged to obtain between the terms “without the consent,” and “against the will,” and it is contended by the Crown that the former is the more accurate, and is sufficient to support this charge. Even if it were the more accurate view—which I do not stop to inquire, but do not admit—it cannot be of moment in this argument. For still the act must have been perpetrated forcibly; and where is force charged in this indictment? Nowhere, as an actual fact substantially alleged. Constructively it is said that in the absence of consent, which is assumed from the woman being asleep, there must have been force used in the act of connection. But this, I apprehend cannot be viewed as the force which the law has declared necessary for the commission of this crime. That force is not the mere physical force required for the completion of the act of connection. What is requisite is the forcibly taking possession of the woman's person and having connection with her, her will resisting; or if not resisting, her will having been overcome by felonious acts of the assailer. It is because nothing of this kind exists on the face of this indictment, that I think the capital charge fails. Had the sleep in which the woman was, been stated to have been induced by felonious practices, such as the use of drugs on the part of the panel, the case would have assumed quite a different aspect. The will might then have been justly alleged to have been overcome with a view to the possession of her person without her consent; just as in the case where through fear and dread by threats of death, the woman has been thrown into a state of prostration, or as when through such threats, or through actual personal violence at the first meeting of the parties, she has been thrown into a swoon, and then her person ravished, the capital crime might be held properly charged. These are cases quite different in their character from that presented by this indictment. The case of children and of insane persons has been founded on, but these are by the law itself put on a very peculiar footing. I concur with Lord Ardmillan as to the principles on which the ravishing of children, and of insane persons has been held equally criminal with rape committed on a grown-up person. I do not think that the principle of that class of cases can safely be extended by analogy to other and different cases.

And as to the case of a woman in syncope, or during a fit of intoxication, I can only say that I shall be prepared to deal with such cases when they come up to us for judgment. According to my present view, I do not think they affect the present question.

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Lord DEAS.—The prosecutor defines rape to be carnal knowledge of a woman without her consent. This, he says, is all that it is necessary to allege as a general rule, and that the cases where anything more has been stated, or requires to be stated are exceptional. It is obvious if this be so, that nearly all the cases that have occurred have been exceptional, and that we have scarcely had an example of the general rule. I do not say that force must in every case be alleged. The case of girls of tender years is an instance to the contrary, resting, however, not so much on the fact that they have neither appetite nor will in the matter (for in some cases, and to some extent they may have both), as on a presumption of law introduced and established to prevent the evils to society and the demoralisation which might otherwise follow; and which presumption accordingly is not allowed to be redargued. It may be that idiots fall within the same principle. I say nothing of insane persons who are not idiots, whose cases may depend on their own circumstances and on degree. But I regard instances of children and of idiots as exceptional; and it does not follow that because an exception is made of cases in which by law, or both by law and nature, the parties are totally disqualified from consenting, an exception shall equally be made of the case of a woman who might have consented if awake, although she neither did nor could consent being asleep. Beyond the case of parties whom the law holds incapable of consent, we have no recorded instance of the element of force being altogether omitted in the indictment. I mean force different from that which is necessarily implied in the act of sexual intercourse, for there is a plain fallacy in confounding what is essential to the act, even when consented to, with the force necessary to obtain opportunity to perform the act. Many of the cases supposed by way of illustration of the prosecutor's argument, are cases which might have been quite as well tried under a libel charging that the intercourse was had with the woman forcibly and against her will. For instance, the use of threats inducing terror sufficient to overcome the will, is a species of compulsion which justifies the words "by force and violence," even in a charge of robbery. Drugging to the extent of insensibility, is even less remote from direct personal violence than presenting a pistol to the forehead, or a dagger to the breast, for such drugging overpowers the will by means of physical appliances to the body (no matter whether to the stomach internally, or by chloroform or the like externally), just as much as if the insensibility had been produced by a blow. That the woman by deception or persuasion may have been made the instrument of introducing into her own stomach the deleterious ingredient, or may have been induced to allow the man to hold chloroform

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to her nostrils, does not make the resulting insensibility less an act of physical violence and injury to the person, than if the man had induced her to take into her own hands a machine, which immediately exploded, and left her stunned and helpless. Cases where the man finds the woman already drugged to insensibility either by her own act or the instrumentality of another, without concert on his part, or finds the woman in a faint, would certainly be cases having less in them than the cases just suggested, of the element of force or compulsion, used to overpower the person or the will, and upon such cases I reserve my opinion till they shall actually occur. I shall only say that I do not hold the present case as necessarily deciding any one of them, nor any of the other cases supposed by my brother Ivory. All of these supposed cases involve one element, at least, which is not here, viz.: the woman being in a state of disease, which it would have been a criminal and violent proceeding for the man to have used means to produce, and it may be a grave question when it arises, whether taking advantage of that state of disease is not equivalent to using means to induce it. Here the woman was not in a state of disease at all, but in the natural state of sleep. There is no room for alleging either criminality or violence, actual or constructive in the production of that state, or any duty of assistance towards recovery connected with it, and although the distinction may be thin between taking advantage of a state of disease and taking advantage of the state of natural sleep, it is necessary to observe by what slight and almost imperceptible steps in the argument it is proposed to lead us on to hold that to be rape which has never been held to be rape before first drugging by the man, about which I do not say I should much hesitate; next accidental drugging by another, or by the woman herself; then the case of a woman found in a faint; and lastly, the case of a woman under no disease, either induced or accidental, but in the natural state of sleep. Stop we must at some thin distinction, or I do not know where we are to stop at all, in dispensing with the element of force, either actual or constructive, which, as a general rule, although not without exceptions, has been immemorially deemed necessary, in our practice to the charge of rape. Progressing at this rate, step by step, the exceptions would soon swallow up and destroy the rule, as the prosecutor seems to think they have done already.

Lord NEAVES.—The only cases of rape known to law are, first, connection with a woman forcibly and against her will—and second, connection with a child. From these cases it is proposed by the Crown to deduce that the circumstances stated in the present case are relevant to infer the charge of rape. It may be a logical deduction; but the stride is at least a very long one—so long that I am not disposed to take it. To the crime of rape by our law the element of violence has always been essential. In the case of an adult person of sound mind this cannot be doubted. In such a case it would not be relevant to allege that the connection was “without her consent.” An established and inveterate practice

requires it to be "against her will." In the case of a child the law introduces a constructive violence. In doing so it merely expresses and recognises a natural law. A child has no passions, no appetites. Its will is a will for purity. Nature herself cries out against connection, and any connection may rightly be presumed to be "against the will." In the case of an insane woman constructive force may also be admitted upon an extension of the same principle, the law not allowing that such a person can exercise the will. But that principle cannot apply to this case, where the woman had a will, and could have exercised it, either to prevent or sanction connection, had she been conscious. The difficulty of the case becomes more obvious when we consider the mode of proof that it would require. The overt acts—the resistance on the part of the woman, the violence on the part of the man, cannot be had here. Moreover, according to the explanation given by the Crown, it is proposed that the words "without her consent" should make it competent to prove that the prisoner had not the prior consent. Truly, this is a most dangerous subject for inquiry—novel, hazardous, and not coming within the analogy of the ordinary rules of evidence applicable to such a case.

Lord President MACNEILL—The writers in our criminal law describe the crime of rape as consisting in having carnal knowledge of a woman's person "forcibly and against her will." These or similar words are generally used by the text writers to describe the crime of rape. That description, if the words be taken in what is perhaps the most strictly literal meaning of them, may be understood to imply the positive presence in every case of rape of two elements, viz., physical force or violence applied to the person, so as to overpower resistance, and coercion of the will while it is in a state of dissent or opposition. Certainly in most cases of rape these two elements do concur; the crime is accomplished by the application of physical force overpowering resistance, and against the remonstrances of the sufferer. But I am not prepared to hold that these two elements, understood in that sense, are essential to the crime of rape. That the knowledge of the woman's person should be obtained against her remonstrance or against her will actively dissenting, or in a state of known antagonism is certainly not necessary in all cases. It is not necessary that the act should be in that sense "against her will." It is not necessary that she should have a will or mind dissenting, or capable of indicating dissent. That is settled in the case of infants under puberty, who, in the estimation of the law, have no will; and some of your lordships have already observed that the same would hold in the case of an insane woman of mature years; so also if by artful means such as the administration of potions, stupefaction is produced, and the faculties are rendered dormant, and the party is for the time without will or the power of volition; it cannot, I think, be doubted, that in that state of mental inability, and especially if it has been produced with the design of taking advantage of it, the act would be held to amount to rape, although

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it could not be said to have been committed "against" the will of the sufferer, if by that is meant against an active will dissenting, or in a state of actual repugnance at the time. But in such a case the connection has been had without her consent, and when she had not mental power to consent. In such cases the expression "against her will" used by the writers can mean nothing else than without her consent, and must be so understood, unless they are to be regarded as imperfect, or rejected as erroneous. Then as to the element of physical force or violence, that also must be subject to limitation and construction. The power of resistance may be removed without the application of any physical force, or it may be overcome by very little force. What degree of force or violence will be held sufficient to constitute rape must depend on circumstances. The degree of violence used may be expected to vary with the power of resistance. The law does not desiderate more force than is necessary to overcome the power of resistance, which may be greater or less according to the condition of the sufferer, who may be a robust active woman, cool and self-possessed, or may be a poor cripple. On the other hand the law does not desiderate more resistance on the part of the woman than her physical condition, whatever it may be, enables her to make. In the case I have already put of a woman designedly reduced to insensibility by potions, or by liquor artfully administered, and whereby her physical as well as mental powers are put in abeyance, the law desiderates no more physical force than is necessary to accomplish the criminal act. I hold, therefore, that in considering what are the essentials of the crime of rape, the descriptive terms "forcibly and against her will," are to be construed with reference to the circumstances of the case, the physical and mental condition of the party injured. Inability to remonstrate or resist may result from various causes. Is it necessary to the crime of rape that the inability shall have been brought about by an act of the accused, with the design of availing himself of it? It is not so if the sufferer be under puberty, or in the opinion of some of your lordships, if she be an insane person. I think it is not so in the case where a man takes advantage of the state of insensibility to which a woman has been reduced by his act or contrivance, although in producing the insensibility he may not have harboured that design, or may even have intended something different, as would be the case of a medical man who should take advantage of the inability to resist produced by opium or chloroform which he had administered for a different purpose to his patient. Such forcible invasion of the woman's person is an assault; the connection is without her consent; and I think that the forcibly invading a woman's person and having carnal knowledge of her, without her consent, through the instrumentality of assault, is nothing less than rape. I think the law would be the same, although the state of insensibility was not at all caused by any act of the accused, but had been knowingly and wickedly taken advantage of by him, such as some of the cases put in illustration

by Lord Ivory, as for instance, the case of a woman abused in a state of syncope, or in a state of insensibility from intoxication. In all these cases the knowledge of the woman's person has been had without her consent, which as regards the will of the sufferer, is all the law desiderates when the mind and its faculties are in abeyance, and it has been accomplished by means of assault which necessarily implies violence—all the violence that was necessary for the accomplishment of the criminal purpose in the circumstances, and therefore, all the violence that the law desiderates in rape. I own that I cannot distinguish the present case from the cases to which I have been alluding. The woman is stated to have been asleep; her mind and its faculties were dormant—in abeyance. The accused is stated to have entered the bed by stealth, wickedly and feloniously—that is, with a criminal intent, the criminal intent being to have carnal knowledge of her person without her consent. He is said to have accomplished this criminal purpose, by means of assault or forcible invasion of her person, for we are all agreed that the act charged against him is assault, at the very least, whatever more it may be, and assault necessarily implies violence—in this case all the violence that was necessary to accomplish his criminal purpose, having regard to the physical condition of the sufferer at the time. It appears to me that an assault feloniously committed on a woman for the criminal purpose, and effectuating the criminal result of having carnal knowledge of her person, without her consent, is rape. I know no more accurate description of that crime. Some of the cases I have put in illustration or as links in the chain of reasoning by which I have arrived at this conclusion have, I am aware, never been presented for judgment in this court. It has been remarked that such cases need not be considered till they arise, and that it might be unsafe to pronounce upon them now when they are not before us for decision. As a general rule I am averse to prejudging cases or points of law. But if I see that the judgment I am asked to pronounce in this case will establish a principle which must rule other cases or classes of cases, I think it right before affirming such a principle, to consider what it must lead to. No one has said that the cases to which I have referred would not be cases of rape. I think it would not be possible so to hold, and as I am unable to distinguish them in principle from the present case, I feel that in solving this case in the negative, we are also virtually solving these cases in the negative, and excluding them by anticipation from the legal category to which I think they belong. It has been suggested that insensibility induced by disease or artificial means may in this question be regarded differently from the natural state of sleep. I confess I do not feel the force of the distinction. In both there is unconsciousness, creating the same inability to remonstrate or resist; the violence resorted to is the same, the injury inflicted is the same. I see no reason for holding that the criminality is not the same. If there be any difference requiring from the law greater vigilance or rigour in the one case than the other, I think that

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the interests of society require that such vigilance and rigour should be exerted to prevent advantage being taken of the state of periodical unconsciousness which nature imposes on all as a necessity of existence, and to which all are entitled to resign themselves in security. I own I was at first somewhat startled by what appeared to me to be the novelty or singularity of the accusation, but on full consideration I was unable to resist the conclusion that the offence charged, if established in the way in which it is laid, does amount to the crime of rape. I am not, however, surprised that several of your lordships still hesitate so to pronounce, and perhaps the result to which the majority have come may be the safer one, as it certainly is the milder, but having arrived at a different conclusion on the law of the case, I have considered it right to state the grounds of my opinion.

*Judgment for the prisoner.(a)*

(a) Though the court found that a conviction for rape could not be sustained, they held under another count, that the facts disclosed one of what are called the "innominate offences," i.e., a crime without a name, which the court assumes power at common law to punish.



## CENTRAL CRIMINAL COURT.

JUNE SESSION, 1859.

(Before the COMMON SERGEANT.)

REG. v. OSCAR LEE AND JOSEPH LEE.(a)

*False pretences—Nature of representation—Exaggeration of quality of goods.**On the trial of an indictment for false pretences, it was proved that the defendant offered a chain in pledge to a pawnbroker, and required 35s. to be advanced upon it, representing that it was gold. On being tested it turned out to be a compound of brass, silver, and gold, but the gold was very minute in quantity.**Held, not a false pretence within the statute.*

**T**HE prisoners were indicted for unlawfully endeavouring to obtain 35s. of Edward Rye, by false pretences. There was a second count for a conspiracy to obtain money by divers false pretences.

The evidence showed that Joseph Lee had gone into the shop of the prosecutor, a pawnbroker, and offered an Albert chain in pledge. He asked 35s. for it, representing that it was gold, that he had bought it in Oxford-street, and had given 3l. 10s. for it. It was tested and found to be little better than brass. There was a very small portion of gold, together with a little silver; the chain being of the value of 13s. A policeman was sent for, but before he arrived an inspector brought into the shop Oscar Lee, who had been waiting outside. He said it is my brother; we are dealers; you can do nothing with us, they are nine-carat gold chains, we bought them at Debenham and Storr's.

*F. H. Lewis* (for the defendants), submitted that there was no case to go to the jury. The statements which were made by Oscar Lee in the presence of his brother, after he was brought in by the inspector, cannot be taken into account, as they were made not for the purpose of obtaining money, but in order to induce the prosecutor not to give him into custody. With respect to the representation made that the chain was gold, that would not be a false pretence within the statute. In *Reg. v. Bryan* (7 Cox Crim. Cas. 312), it was held that a similar representation would not support an

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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v.  
OSCAR LEE  
AND  
JOSEPH LEE.  
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False pretences

indictment. There the defendant had falsely stated that certain forks which he offered in pledge were equal to Elkington's (Elkington's plate being an article of well-known and recognised value in the trade), but the court held that such a misrepresentation was not within the act, it being with respect to quality only, and not as to the description of the thing itself. Then the article is clearly of some value, and the best gold chains are not made of fine gold, they all have alloy mixed with the more valuable metal; and in this case the chain contains some *gold*, although in a very small quantity.

*Sligh* (for the prosecution).—The case is within the statute. The question for the jury will be whether this is a gold chain within the recognised meaning of that term. If the contention on the other side is correct, then the most minute fraction of gold introduced into a chain of brass would constitute the brass chain a gold one. In *Reg. v. Bryan* the false statement was simply with regard to quality, here it is made with reference to the thing itself: (*Reg. v. Roebuck*, 7 Cox Crim. Cas. 126; *Reg. v. Sherwood*, 7 Cox Crim. Cas. 270). At all events there is evidence on the count for conspiracy.

*Lewis* (in reply).—The two cases cited were fully considered in *Reg. v. Bryan*, and the same arguments were used. As to the count for conspiracy, that must fail, as the conspiracy is alleged to be by false pretences to obtain, &c.

The COMMON SERGEANT.—I think there is no evidence to go to the jury. It is the constant practice for the seller to exaggerate the value of his goods, and for the buyer to depreciate it without coming within the charge of "false pretences" as meant by the statute. If because a man represents an article to be equal in quality to something which it is not equal to, he is liable to be indicted, charges of this kind would be multiplied to an alarming extent. I think the prisoner must be acquitted.

*Not guilty.*

*Sligh*, for the prosecution.

*F. H. Lewis*, for the defence.

## CENTRAL CRIMINAL COURT.

JUNE SESSION, 1859.

(Before the COMMON SERGEANT.)

REG. v. SELWAY AND WYNN.

*Robbery—Stealing from the person—Property under the protection of the person.*

*On a trial for robbery and stealing from the person, it was proved that the prosecutor, who was paralyzed, received, whilst sitting on a sofa in his room, a violent blow on the head from one of the prisoners, whilst the other went to a cupboard in the same room, and stole therefrom a cash box.*

*Held, that it was a question for the jury whether the cash box was at the time under the protection of the prosecutor. If so, the charge of stealing from the person would be sustained.*

THE prisoners were indicted for robbery and stealing from the person. The evidence showed that the prosecutor, who was paralyzed, received, whilst sitting on a sofa, in a room at the back of his shop, a violent blow on the head from one of the prisoners, whilst the other went to a cupboard in the same room, and stole therefrom a cash box, with which he made off.

*Orridge* (for the prisoners), submitted that on this evidence there was no proof of a stealing from the person. The cash box at the time it was stolen was at some distance from the place where the prosecutor was sitting, and could not be said, therefore, to be about his person.

*Robinson* (for the prosecution), contended that it was quite sufficient for the purposes of the indictment, to show that the cash box, was under the protection of the prosecutor; it need not be in his bodily possession. He was near enough to it to protect it, at least by raising an alarm. It was laid down in 1 Hale P. C. 533: "If a thief put a man in fear, and then in his presence drive away

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his cattle it is a robbery. So, if a man being assaulted by a robber throw his purse into a bush, or flying from a robber, let fall his hat, and the robber in his presence take up the purse or hat and carry it away this would be robbery."

The COMMON SERGEANT, having consulted Mr. Jus. Crowder and Mr. Baron Channell, held, that although the cash box was not taken from the prosecutor's person; yet it being in the room in which he was sitting, he being aware of that fact, it was virtually under the protection of his person. He should under the circumstances leave this question to the jury: was the cash box under the protection of the prosecutor's person at the time when it was stolen.

The jury found that it was.

*Robinson*, for the prosecution.

*Orridge*, for the defence.

*Guilty.*

## CENTRAL CRIMINAL COURT.

JULY SESSION, 1859.

(Before Mr. Baron BRAMWELL.)

REG. v. CLOUTER AND HEATH. (a)

*Plea of guilty by one prisoner—Examination of one prisoner against another—Permission to withdraw plea of guilty after such examination—Subsequent trial.*

*On the trial of an indictment for forgery against two prisoners, one of them, after the opening speech for the prosecution, asked to be allowed to withdraw his plea of not guilty, and to plead guilty. This was done, and the plea of guilty was recorded. He was then examined as a witness on the part of the prosecution against his co-defendant, and in the course of such examination he swore that he had no knowledge of the instrument in question being forged. Upon this he was allowed to withdraw his plea of guilty and to plead not guilty, the jury withdrawing their verdict. The trial of the other prisoner was then proceeded with, and on his acquittal, the one who had withdrawn his plea was put upon his trial.*

THE prisoners were indicted for forgery, they both pleaded not guilty. After the opening speech for the prosecution,

Ribton (for the prisoner Clouter), asked that he might be allowed to withdraw his plea of not guilty, and plead guilty. This was done, and the verdict of guilty pronounced by the jury was recorded. He was subsequently called as a witness against the co-defendant, and in the course of his examination he swore, that although he uttered the instrument alleged to be forged, he was ignorant of its being forged. On being questioned he said that he had pleaded guilty under a misconception of the nature of the charge, and merely meant to say that he was the person who had in fact uttered the document. Under these circumstances,

BRAMWELL, B., having consulted Crompton, J., said that he should allow the prisoner to withdraw his plea of guilty, inasmuch, as he had sworn that it was pleaded by mistake, and the jury would withdraw their verdict.

(a) Reported by B. G. ROBINSON, Esq., Barrister-at-Law.

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AND  
HEATH.  
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*Pleading.*

The case of the prisoner Heath was then proceeded with, and he was acquitted.

Clouter was then put again on his trial, the jury being already charged, and after hearing the evidence, they found him guilty.

*Giffard*, for the prosecution.

*Ribton*, for the prisoner Clouter.

## CENTRAL CRIMINAL COURT.

JULY SESSION, 1859.

(Before the COMMON SERGEANT.)

REG. v. BAILLIE. (a).

*Abduction—Marriage—Taking a girl out of possession of father—*  
9 Geo. 4, c. 31, s. 20.

*A girl, under the age of sixteen, who was living in her father's house, was induced by the defendant to go to a chapel and be married to him. She was only away from her home for an hour or two, and after her return continued to live with her father as before, he being ignorant of what had taken place. The marriage was never consummated. Held, that there was sufficient evidence of her having been taken out of her father's possession to satisfy the statute, 9 Geo. 4, c. 31, s. 20.*

THE defendant was indicted for the abduction of a child under the age of sixteen years. It appeared in evidence that the defendant had been for several months lodging in the house of the girl's father. During that time she and the defendant became engaged, and on the 26th May he induced her to go with him to a Roman Catholic chapel, where they were married. The girl immediately returned to her father's house, and continued to live there as before; her father being entirely ignorant that any marriage had taken place, until two or three weeks afterwards. It appeared that the marriage had never been consummated.

*Doyle* (for the defendant), submitted that on these facts the defendant could not be convicted. The girl had never been taken

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

out of her father's possession within the meaning of the act of Parliament. She left her father's house for a mere temporary purpose as she might have done at any other time, she immediately returned, and the father seemed not even to have been aware of her absence. He had then just as much control over her as he had before. This was nothing more than a secret marriage, and could not be strained into an abduction.

*F. H. Lewis* (for the prosecution), contended that the marriage without the father's consent was an abduction within the meaning of the statute. After the marriage the father had no legal control over the girl, he had a nominal possession which the prisoner had power to destroy at any time. The offence was complete the moment the marriage took place, and as to the girl returning home immediately, that would no more purge the crime than the immediate return of a handkerchief to a pocket whence it was stolen would purge the larceny.

The COMMON SERGEANT, after consulting the Recorder, said that the girl could not be considered to be in the father's possession, although she was in his house, because she was in the lawful possession of her husband, and the father never could have the custody of her in the same sense as before her marriage. The distance she was taken, and the time she was kept away were immaterial, her husband having power to take her away whenever he liked, and her whole relationship to her father being altered by the marriage. Under the circumstances the Recorder agreed with him that there was sufficient evidence to go to the jury.

*F. H. Lewis*, for the prosecution.

*Doyle*, for the defence.

*Guilty.*

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v.  
BAILEY.  
—  
1859.  
—  
*Abduction.*

## COURT OF CRIMINAL APPEAL.

November 12, 1859.

(Before POLLOCK, C.B., WILLES, J., CHANNELL, B., HILL, J.,  
and BYLES, J.)

REG. v. INGHAM. (a)

*Bankruptcy—Misdemeanor—12 & 13 Vict. c. 106, ss. 252 & 256.—  
False books—False entries—Intent to defraud creditors.**A bankrupt was indicted under the 12 & 13 Vict. c. 106, s. 252, for making a false and fraudulent entry in a book of account with intent to defraud his creditors. The jury found that he had made the false entry with intent to deceive his creditors, but not with intent to defraud them of any money or property, or in any way to prevent them recovering any part of his estate.**Held, that this was a mere concealment as to the mode of expenditure, and not done with intent to defraud the creditors of any property, it did not come within the 252nd section, but was properly cognisable under the 256th section, when the question of granting or withholding the certificate came before the commissioners.***T**HIS was a case stated by Crompton, J., as follows:—

The prisoner was convicted before me at the June Old Bailey sessions, for having made a false and fraudulent entry in a book of account with intent to defraud his creditors, on an indictment framed upon the 252nd section of the Bankruptcy Act, 12 & 13 Vict. c. 106. It appeared that the prisoner had kept a book in which he entered his receipts and payments, and at the time of his bankruptcy, that book showed receipts of money to the amount of 4,150*l.* 19*s.* 7*d.*, and payments to the amount of 3,801*l.* 10*s.*, leaving a deficiency of 349*l.* 9*s.* 7*d.* to be accounted for. Being uneasy as to accounting for this deficiency, he made a false book in which he entered false amounts opposite many of the items of receipts and payments, so as to show receipts by him to the amount of 2,668*l.* 5*s.* and payments to the amount of 3,172*l.* 1*s.* 7*d.*

The jury found that this was done by him with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account,—but they found that it was not

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.



done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him. On this finding the jury, by my advice, returned a verdict of guilty, subject to a case to be reserved by me as to whether the false entries were upon the state of facts found by the jury made "with intent to defraud his creditors," within the meaning of those words in the above-mentioned section.

It may be observed that the 252nd section renders it necessary that besides the act being done to defraud creditors it should be done either "after an act of bankruptcy," or "in contemplation of bankruptcy," or "with intent to defeat the object of the law relating to bankrupts," which expressions may be argued to show that something more than defeating the operation of the bankrupt laws is intended by the phrase "with intent to defraud his creditors:" (see *Gordon's case*, Dears. 586, top of p. 588, bottom of p. 600, and top of p. 601.)

The prisoner is at large on bail.

The Bankrupt Act, s. 252, is as follows:—"That if any bankrupt after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of the law relating to bankrupts, destroy, alter, mutilate, or falsify any of his books, papers, writings or securities, or make, or be privy to the making of any false or fraudulent entry in any book of account, or other document, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanor, and on conviction be liable to imprisonment for any term not exceeding three years, with or without hard labour."

The 256th section is as follows:—"If at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the court, that the bankrupt has committed any of the offences hereinafter enumerated, the court shall refuse to grant the bankrupt any further protection from arrest, and if at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt, it shall appear that he has committed any of such offences, the court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection."

Offences referred to:—

Second.—If the bankrupt shall, with the like intent have kept or caused to be kept, false books, or have made false entries in, or withheld entries from, or wilfully altered or falsified any book, paper, deed, writing, or other document, relating to his trade, dealings or estate.

CHARLES CROMPTON.

*Lawrence* (for the defendant).—This case does not fall within the 252nd section of the Bankrupt Act. The 256th section is one which seems entirely framed to meet the facts found by the jury.

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creditors.

The defendant is proved to have kept a false book in which he entered false amounts with intent to deceive his creditors. This is entirely the state of things contemplated by the last-mentioned section, and which the Commissioner of Bankruptcy is to take into consideration at the certificate meeting. The 252nd section was meant to apply to a case where the act of the bankrupt was done with intent to defraud his creditors of some property; here when the false book was prepared all the money had been spent, and he, therefore, could not have intended to defraud any creditor of such money. Intending to deceive is very different from intending to defraud, it is easy to deceive a person without defrauding him. The latter word necessarily implies some loss to the person defrauded. In *Reg. v. Marner* (C. & M. 628) the defendant was indicted under the 1 & 2 Vict. c. 100, s. 99 (which contained somewhat similar words to the present section) for the omission of certain property from his schedule, and Lord Abinger said, that he thought the evidence of such an omission would not support a charge upon so highly penal a statute.

He was then stopped by the court.

*Ballantine, Sergt., Jacobs* with him (for the prosecution).—The simple question is whether the word defraud, as it is used in the statute, necessarily means to deprive of some money or chattel. The defendant evidently intended to defeat the object of the statute by concealing the real state of his affairs from his creditors.

*POLLOCK, C.B.*—It may be summed up very shortly by saying, the defendant meant to do himself some good, and meant to do his creditors no harm.

*HILL, J.*—He may have been guilty of the first intent to defeat the object of the law relating to bankruptcy, but the other intent must also be proved, namely to defraud his creditors, which must mean to deprive them of some property.

*Ballantine, Sergt.*—Here it was done clearly to deceive his creditors; the jury have so found.

*CHANNELL, B.*—But that will not do, it must be to defraud them of property.

*Ballantine, Sergt.*—To deceive and defraud are here the same thing.

*POLLOCK, C.B.*—Is there any case where fraud and deceit have been held to mean the same thing.

*Ballantine, Sergt.*—In Johnson's Dictionary one of the meanings of "to defraud" is "to deceive."

*BYLES, J.*—To defraud no doubt means to deceive, but it means something more.

*POLLOCK, C.B.*—If a man wore an apron for the purpose of concealing a ragged dress beneath, he might mean to deceive, but not to defraud. To defraud may be perhaps best represented by to cheat, as in *Hudibras*,—

"Doubtless, the pleasure is as great  
Of being cheated, as to cheat."

To defraud is to cheat a person out of something.

*Ballantine*, Sergt.—The word defraud is no doubt usually used in connection with some individual who is the object of the fraud, but here it is used generally.

BYLES, J.—But the intent to defraud in a general sense is the first intent mentioned in the section, namely to defeat the bankrupt laws, but that will not do alone.

HILL, J.—The crime is cheating a man out of something belonging to himself; here the jury have negatived expressly that it was intended to prevent the creditors from getting in every shilling of the bankrupt's estate.

POLLOCK, C.B.—See what your argument would lead to. By a run upon a mercantile house the principal might be declared bankrupt, and although he paid 20s. in the pound, still if there appeared to be any false book, or any false entries, however little they were intended to defraud his creditors, he might be convicted under this section. There are many reasons why a man should make false entries in his books quite irrespective of an intent to commit a fraud. He might spend his money in gaming, or in other pursuits, and the entries might be made for the mere purpose of concealing the mode of expenditure.

*Ballantine*, Sergt.—In *Reg. v. Davidson and Gordon* (7 Cox Crim. Cas. 158), it was held that the intent to defraud might be presumed, where a person went abroad, and so prevented his creditors from ascertaining the true state of his affairs.

POLLOCK, C.B., (delivering judgment).—In this case the jury have expressly found that the act of the bankrupt was done with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in due course of bankruptcy, but they find that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent the creditors from recovering any part of the estate. Now what the jury have found may have been done with intent to interfere with the operation of the bankrupt laws, but it must also be done with intent to defraud the creditors. The jury have expressly negatived any such intent. On this finding, which distinguishes this case from every other, it is impossible to sustain this conviction. The case I put in the course of the argument seems to me unanswerable. If we were to hold the defendant guilty upon this evidence, then the mere concealment of a particular mode of expenditure would be a breach of the act, although there was no intention to defraud anybody, and the estate might pay 20s. in the pound. I think this could never have been the meaning of the Legislature, and the rest of the court I believe entirely concur with me.

The other judges concurred.

*Conviction quashed.*

*Ballantine* and *Jacobs*, for the prosecution.

*Lawrence*, for the defence.

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v.  
INGHAM.  
1859.

Bankruptcy—  
Misdemeanor—  
False books—  
Intent to  
defraud  
creditors.

## COURT OF CRIMINAL APPEAL.

November 26, 1859.

(Before POLLOCK, C.B., WILLIAMS J., CROWDER, J.,  
CHANNELL, B., and HILL, J.)

REG. v. WESTLEY. (a)

*Perjury—Insolvent Court—Jurisdiction—Evidence—Variance—Amendment—Misrecital of statutes.*

*The defendant was indicted for perjury committed before the Insolvent Court.*

*The indictment alleged that he was a trader, whose debts amounted to less than 300l.; that he had resided six months within the jurisdiction; that he petitioned the court; that notice was given thereof to the creditors in the Gazette, and that a day for hearing was duly appointed and adjourned, and that on such adjourned day he falsely swore, &c.*

*Held, that the defendant's petition alleging that he was a trader owing less than the sum of 300l. was sufficient evidence of the last-mentioned facts.*

*Held, also, that the Insolvent Court, being a court of record, proof of the filing of the petition is sufficient to warrant the presumption that the sittings of the court are lawfully holden; and that, therefore, it is unnecessary to give specific evidence that notice of the petition was given to the creditors, or inserted in the Gazette, and that a day for the hearing had been duly appointed and duly adjourned.*

*An averment in the indictment, that the insolvent filed his petition "to wit, on the 20th day of May, 1859," is sufficient to show that he filed it after the passing of the statute, 10 & 11 Vict. c. 102, for the court will take judicial notice of the time at which a statute was passed.*

*A judge on the trial of an indictment for perjury has power to amend the description of an act of Parliament named in the indictment.*

*Where the statute is mentioned in the indictment for the mere purpose of alleging that the offence was committed after its passing, and the alleged date of the offence is subsequent to such passing, the reference to the statute may be rejected altogether.*

*Semble, that where the title of an act of Parliament is inaccurately described, and the inaccuracy is so trifling that the court cannot fail to know with certainty what act is meant, the variance is immaterial.*

CASE.

**A**T a Session of Oyer and Terminer and Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, in September last, Robert Westley was tried before me on an indict-

ment, a copy of which is hereto annexed. The necessary evidence for supporting a conviction was given upon the trial, except so far as appears by this case, and as to the sufficiency of which the opinion of the Court for the Consideration of Crown Cases Reserved is requested.

In support of the preliminary averments contained in the indictment, to the effect that the defendant was a trader within the meaning of the statutes relating to bankrupts, but owing debts in the whole to less than 300*l.*, and having resided for six calendar months next immediately preceding the filing of his petition, within, &c. The prosecutor produced no other evidence than the petition of the defendant, filed in the Insolvent Court, a copy whereof is hereto annexed.<sup>(b)</sup> There was no evidence of the Court for the Relief of Insolvent Debtors having appointed the 22nd of June for the first examination of the petitioner, or of the adjournment of the same. Neither was evidence given of notice to creditors in the *London Gazette*, of the filing of the petition. It was objected by the counsel for the prisoner that the evidence was insufficient to support the indictment. It was further objected that the prisoner could not be found guilty on the indictment, by reason of the misrecital of the acts of Parliament in the introductory part of the indictment.

I was requested by the counsel for the prosecution to amend the indictment by striking out those parts which appeared in red ink (c) in the copy hereto annexed. It was objected on the part of the defendant that I had no power to amend as prayed. I overruled the objection, and ordered the indictment to be amended as prayed. The defendant was found guilty, but I consented to reserve for the judgment of the Court for the Consideration of Crown Cases Reserved, the following questions, viz. :—

First. Whether under the circumstances herein appearing, the evidence was sufficient to support a conviction.

Secondly. Whether the court had power to amend the indictment as stated, and whether as amended it is sufficient. The conviction of the defendant is to be subject to the determination of the Court for the Consideration of Crown Cases Reserved on these points.

Defendant is in custody for want of bail, and judgment stands respited.

R. MALCOLM KERR,

Judge of the Sheriffs Court of the City of London.

8th November, 1859.

#### INDICTMENT.

Central Criminal Court, } The jurors for our Lady the Queen upon  
to wit. } their oath present, that heretofore, and  
after the passing and coming into operation of a certain act of Parliament, made and passed in a certain session of Parliament, holden in the fifth and sixth years of the reign of her present Majesty, intituled *An*

(b) The allegations in the petition were the same as those mentioned below in the indictment.

(c) What was written in red ink in the Case is printed below in italics.

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*Act for the Relief of Insolvent Debtors*; and after the passing and coming into operation of a certain other act of Parliament, "*holden in the seventh and eighth years of the reign of her present Majesty*," intituled, *An Act to amend the Law of Insolvency, Bankruptcy, and Execution*; and after the passing and coming into operation of a certain other act of Parliament, "*made and passed in the tenth and eleventh years of the same reign*," intituled, *An Act to abolish the Court of Review in Bankruptcy, and to make alterations in the Jurisdiction of the Court of Bankruptcy, and Court for the Relief of Insolvent Debtors*, to wit, on the 20th day of May, 1859. Robert Westley, hereinafter mentioned, being a trader within the meaning of the statutes in force relating to bankrupts, but owing debts amounting, in the whole, to less than 300*l.*, and having resided for six calendar months next immediately preceding the time of filing his petition hereinafter mentioned within the parish of St. Matthew, Bethnal Green, in the county of Middlesex, within the jurisdiction of the said Central Criminal Court, the distance whereof is less than twenty miles from the Insolvent Court, hereinafter mentioned, according to the laws then in force relating to insolvent debtors, did present his petition to the Court for the Relief of Insolvent Debtors in England, to wit, at Portugal Street, Lincoln's-inn-Fields, and within the jurisdiction of the said Central Criminal Court, the same petition having annexed thereto a schedule purporting to be a full and true schedule of his debts, with the names of his creditors and other the particulars required by law; and the said Robert Westley did thereupon, in and by his said petition, show, amongst other things, to the said court, that he was a trader within the meaning of the statutes then in force, relating to bankrupts, but owing debts amounting, in the whole, to less than 300*l.*; that he, the said Robert Westley, had resided six calendar months within the district of the Insolvent Debtors Court in Portugal Street aforesaid; and that he, the said Robert Westley, had become indebted to divers creditors, whose names were inserted in the schedule to the said petition annexed; and that he, the said Robert Westley, was unable to pay the debts in full; and the said Robert Westley was desirous that his estate should be administered under the protection and direction of the said Insolvent Court; whereupon he by his said petition did pray such relief in the premises as by the statutes then and now in force for the relief of insolvent debtors, might be adjudged by the said Insolvent Court as by the said petition, signed by the said Richard Westley, on the said 20th day of May, in the year aforesaid, in the presence of his attorney, in the matter of the said petition, duly verified by the affidavit of the said Robert Westley, in the form in the schedule annexed to the said secondly recited Act A. No. 2, filed in the said Court for the Relief of Insolvent Debtors, reference being thereunto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present, that forthwith and after the filing of the said petition, the said Court for the Relief of Insolvent Debtors, caused notice of the filing of the said petition to be given to the creditors of the said Robert Westley named in the said schedule, and resident within the United Kingdom, and whose debts respectively amounted to the sum of 5*l.*, to be inserted in the *London Gazette*, and thereby appointed a public sitting of the said Court for the Relief of Insolvent Debtors, at Portugal Street aforesaid, to wit, on the 22nd day of June, in the year aforesaid, for the first examination of the said petitioner, and the said court did duly, to wit, on the day and year last aforesaid, proceed to the holding of the said sitting, and then

adjourned the same sitting to the 15th day of July, in the year aforesaid, to wit, at Portugal Street aforesaid, whereupon afterwards, to wit, on the said last mentioned day, the said Court for the Relief of Insolvent Debtors, did proceed to ascertain the truth of the allegations in the said schedule and petition, to the end that the said Robert Westley might have relief in the premises. And the jurors aforesaid, upon their oath aforesaid, do further present that to the end last aforesaid, to wit, on the day and year last aforesaid, at the Insolvent Debtors Court aforesaid, in Portugal Street aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, the said Robert Westley did appear in his own proper person, before the said Court for the Relief of Insolvent Debtors, then and there to be examined, touching and concerning the truth of the allegations contained in the said petition, and of the several matters contained in the said schedule, and the said Robert Westley was then and there in due manner sworn before the said Court for the Relief of Insolvent Debtors, and did take his corporal oath, upon the Holy Gospel of God, to speak the truth and give true evidence on such examination, and touching and concerning the allegations and matters and the truth thereof, and of and concerning all other matters in any way relating thereto; the said court then and there having sufficient and lawful competent power and authority to administer the said oath to the said Robert Westley in that behalf. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Westley being so sworn as aforesaid, was then and there in due manner examined, by and before the said Court for the Relief of Insolvent Debtors, on his said oath, touching and concerning the truth of the allegations contained in the said petition and the several matters aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that at and upon the said examination, it became and was a material question and subject of inquiry, and it became and was a material question and subject of inquiry in the premises, and in relation to the truths of the allegations contained in the said petition, and of the several matters contained in the said schedule, and it became and was material that the said court should ascertain and be informed for the purpose of adjudicating in the matter of the said petition, whether or not the said Robert Westley had ever passed, or was ever known, by the name of Charles Westley; and whether or not he, the said Robert Westley, had ever signed a certain memorandum of agreement, then and there upon the adjudication of the said petition produced and shown to him, the said Robert Westley, bearing date the 30th day of August, in the year of our Lord 1852, and purporting to be made between John Kidgell of the first part, Samuel Gostage of the second part, William Kidgell of the third part, and Charles Westley of the other part, and whether or not the said Robert Westley had negotiated for the purchase of certain premises of and belonging to John Kidgell, situate at Reading, in the county of Berks, in the name of Charles Westley, and whether or not a certain letter bearing date the day of April, in the year of our Lord 1853, and produced and shown to him upon the said examination, was in his handwriting. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Westley being so sworn as aforesaid, then and there upon his said examination, at and before the said Court for the Relief of Insolvent Debtors, unlawfully, wickedly, wilfully, maliciously, falsely, and corruptly, did depose, swear, and say, amongst other things, in

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substance and to the effect following, that is to say, that he the said Robert Westley had never passed by the name of Charles Westley; that he the said Robert Westley did not sign the said memorandum of agreement so produced and shown to him as aforesaid, and that he the said Robert Westley believed the signature Charles Westley, signed thereto, to be in his the said Robert Westley's brother's handwriting, and that he the said Robert Westley believed the signature to the said letter to be in his brother's handwriting; whereas he the said Robert Westley had passed by the name of Charles Westley; and whereas he the said Robert Westley did sign the said memorandum of agreement; and whereas he the said Robert Westley did not believe the signature Charles Westley signed thereto to be in his the said Robert Westley's brother's handwriting; and whereas the said Robert Westley did not believe the signature to the said letter to be in his brother's handwriting, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Westley in so making and taking the said oath on the said 18th day of July, in the year aforesaid, at Portugal Street, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, before the said Court for the Relief of Insolvent Debtors, unlawfully, knowingly, wilfully, and corruptly, did commit and was guilty of wilful falsehood in manner aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Metcalf* (for the defendant).—The first question is, whether what was necessary in order to give the Insolvent Court jurisdiction, has been proved to have taken place. The Insolvent Court is the mere creature of the statutes. It sits by virtue of the statutes 5 & 6 Vict. c. 116, s. 1, 7 & 8 Vict. c. 96, ss. 1, 2, & 3, and the 10 & 11 Vict. c. 102, s. 6, and all the preliminaries required by those statutes to constitute it a court, must be alleged and proved; if this is not done, it is not a court before which perjury can be committed. One thing required is, that the defendant should be a trader owing debts to a less amount than the sum of 300*l.* The mere production of the petition alleging this fact was not sufficient: it must be established *aliunde*. Another requirement is, that notice to the creditors should be given in the *Gazette*; of this there was no proof whatever, neither was there any proof that the court appointed a day for the examination of the insolvent, and that that day was duly adjourned. Unless all these things were done, the examination was *coram non judice*.

POLLOCK, C.B.—Take the case of the Central Criminal Court, which sits by authority of an act of Parliament, on certain days appointed for that purpose by the judges, would it be necessary in alleging perjury committed there, to show that not less than eight of the judges had met and had appointed certain days, and that those days were duly adjourned from one day to another? The Central Criminal Court is as much the creature of a statute as the Insolvent Debtors Court. Or, suppose a case of perjury committed before the House of Lords, would it be necessary to prove the Queen's proclamation calling the house together? The one is as necessary a preliminary to the jurisdiction as the other.



*Metcalfe*.—In *Reg. v. Jones* (4 B. & Ad. 345), an indictment under the old bankrupt laws, alleging that the defendant had been adjudged a bankrupt under a commission, and charging him with conspiring with others in concealing his goods, was held bad for not alleging that the defendant was in fact a bankrupt.

POLLOCK, C.B.—And rightly, because the words there, “against whom a commission of bankrupt had issued,” meant, had duly issued. The commissioners under the old statute had only a special authority to inquire, in the same way as commissioners now have who are appointed to inquire into bribery at elections, &c.

HILL, J.—You contend that if a man presents a petition alleging that he is a trader owing debts, &c., and in the most barefaced manner swears that these things are true, when they are in fact false, he cannot afterwards be indicted for perjury in a matter having reference to his insolvency, because the commissioners had no jurisdiction as he was not a trader, although he swore he was. If this is so, then the greater the rogue the greater the immunity. There is express power given to the court to inquire into the truth of the allegations, and if the court is satisfied of the truth of the affidavit and acts upon them, there is jurisdiction.

*Metcalfe*.—But it is not upon the matters alleged in the affidavit that he is indicted, but upon matter occurring subsequently at an adjournment, and it was essential to allege and prove that such adjournment was in pursuance of the act. In *Reg. v. Lands* (25 L. J. M. C. 14), which was a charge against a bankrupt for fraudulently obtaining goods on credit, it was held necessary that all the facts which were required to give the court jurisdiction, should be proved—such as the act of bankruptcy, &c.

WILLIAMS, J.—There the offence could not be committed unless the defendant was a bankrupt. The act under which that indictment was preferred, says, “If any bankrupt shall obtain,” &c., not “If any person shall obtain,” &c.; and there was no proof that the obtaining the goods was not anterior to the act of bankruptcy. But why would it not be sufficient to allege here simply that the perjury was committed before the Court for the Relief of Insolvent Debtors: surely we must presume that the court is sitting under competent authority.

POLLOCK, C.B.—This is an indictment for false swearing in the Insolvent Court upon a matter material to the inquiry before it. It would have been sufficient to allege that the court had authority to administer the oath, and the allegations referred to might have been left out altogether. The Insolvent Court is a court of record, and when it sits we must presume it does so under due authority.

*Metcalfe*.—The next objection is, that the amendments were not authorised by the 14 & 15 Vict. c. 100; these errors are not *ejusdem generis* with those mentioned in the act.

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POLLOCK, C.B.—We think there is nothing whatever in this objection.

*Metcalf*.—Then in the indictment as amended, the statute is stated to be entitled, *An Act to make alterations in the Jurisdiction of the Court of Bankruptcy*, instead of “Courts of Bankruptcy;” and “Court for Relief,” instead of “for the Relief.”

POLLOCK, C.B.—The court is bound to take notice of all statutes, and we know there is no other statute that could be referred to except the one in question.

*Metcalf*.—There are cases in which misrecitals as trifling as these have been held fatal: (*Boyce v. Whitaker*, 1 Doug. 90; *Beck v. Beverley*, 11 M. & W. 845; *R. v. Byers*, 1 A. & E. 327; *R. v. Marsack*, 6 T. R. 671.)

*Pearce* (for the prosecution), was not called upon.

*Cur. adv. vult.*

#### JUDGMENT.

POLLOCK, C.B.—This case was argued a few days ago. The first question considered and argued by the counsel for the prisoner was, whether the allegations in the indictment that the prisoner was a trader owing debts to a less amount than 300*l.*, and that he resided and professed to reside, &c., were sufficiently proved by the production of the petition signed by the prisoner and presented by him to the Insolvent Court. The petition alleges the very same matters of fact on which, with others, the prisoner rested his application to the Insolvent Court. As against him, therefore, the statement in the petition, uncontradicted by any conflicting testimony, were abundant evidence to prove the allegation. The second objection argued by the prisoner's counsel was, that no evidence was given at the trial to prove the allegations in the indictment, that notice of the petition was inserted in the *Gazette*, and that a day was appointed for taking the examination of the prisoner; and that at the sitting on that day, it was adjourned to the 13th of July. It was contended, on behalf of the prisoner, that these allegations were material, and that as they were not proved, the court had no jurisdiction to institute the examination, so as to make the prisoner criminally responsible for having sworn that which was false. It was proved that the petition of the prisoner was filed in the Insolvent Debtors Court, and by the combined effect of the 7 & 8 Vict. c. 96, and the 10 & 11 Vict. c. 102, that court, upon a petition being filed, had jurisdiction to institute the examination on which the prisoner swore falsely. The Insolvent Debtors Court is a court of record. We must take notice of that fact, and must presume that its sittings in a matter within its jurisdiction, were lawfully and rightly holden. The indictment contains a general allegation that the court had sufficient and lawful and competent power to administer the oath to the prisoner on his examination touching and concerning the truth of the matters contained in the petition and schedule. That in our opinion is quite sufficient to support the indictment (see 14 & 15 Vict. c. 100, s. 20), and the allegation, of which no proof was

offered at the trial, may be rejected. The last objection raised was, that the judge who presided at the trial had not power to make an amendment by striking out the words inaccurately describing the time when the statutes passed; but that, even if he had such power, the amendment did not go far enough, as the title of the statute 10 & 11 Vict. c. 102, still remained incorrectly set out, namely, that the word "courts" is written "court," and the description "Court for Relief of Insolvent Debtors" was written "Court for *the* Relief of Insolvent Debtors." The difference therefore between the title as existing on the Parliament Roll, and the title as it occurred in the indictment, was, that in one the word "courts" in the plural occurred, in the other "court" in the singular; in the one "for the relief of insolvent debtors," in the other simply "for relief." With respect to the first part of the last objection, that the judge had not power to make the amendment, that was not much insisted on, and during the argument we expressed our opinion that the judge had the power to amend. But with regard to the latter part of the objection, that the title of the 10 & 11 Vict. c. 102, was inaccurately described, it was argued that in consequence of the difference in the description of the title of the statute, and the failing to describe it accurately, the variance was fatal, and many authorities were referred to in support of the objection. It is unnecessary for the court to examine their applicability or to decide whether the variance of such matters is material, because in reading the indictment it is manifest that the reference is made to the statute only to indicate that the petition of the prisoner to the Insolvent Debtors Court, was presented after the passing of the statute. There is, however, in the indictment a sufficient allegation of the time when the petition was presented, namely, the 20th of May, 1859, being a day after the passing of the act, of which we are bound to take notice, so that the reference to the statute in the indictment may be altogether rejected. This objection also fails, and the conviction must be affirmed. What I am now about to state is no part of the judgment which I have given, but my own opinion, notwithstanding, and which, I believe, is the opinion of every member of the court, is this,—in a case where the title of an act of Parliament is not accurately stated, but is stated with so much clearness and sufficient accuracy as to enable the judges (who know the titles of all the acts that have ever passed), to know that there can be but one act referred to, I must say I, for one, notwithstanding the cases that were cited, am prepared to hold, that where a variation is so small and insignificant that there can be no possible doubt as to what is the act referred to, and the title of which is intended to be set out, this furnishes no ground of objection, and I am not prepared to apply the doctrine which has been laid down in the cases that have been cited.

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*Conviction affirmed.*

*Pearce* for the prosecution.  
*Metcalf* for the defence.

## CENTRAL CRIMINAL COURT

NOVEMBER SESSION, 1859.

(Before the RECORDER.)

REG. v. FRENCH. (a)

*Assault—Venue—Offence commit'ed in course of journey—7 Geo. 4, c. 64, s. 13—4 & 5 Will. 4, c. 36, s. 2.*

*On an indictment for assault, it was proved that the offence was committed in one of the carriages of a train running from Brighton to New Cross, and before the train had arrived at the Three Bridges Station, in the county of Sussex. At that station the prosecutrix left the carriage in which she had been riding with the defendant, and rode in another carriage of the same train to New Cross, which is within the jurisdiction of the Central Criminal Court.*

*Held, that by the joint operation of the 7 Geo. 4, c. 64, s. 13, and the 4 & 5 Will. 4, c. 36, s. 2 (the Central Criminal Court Act), the indictment was properly preferred and tried at the Central Criminal Court.*

THE defendant was charged by the indictment with an assault.

It was proved in evidence that the prosecutrix and the defendant left Brighton together by a train which went to the New Cross Station, which station is within the jurisdiction of the Central Criminal Court. The assault was committed between Brighton and the Three Bridges Station in the county of Sussex, and on the arrival of the train at the last-mentioned station, the prosecutrix left the carriage in which she had previously been riding with the defendant, went into another carriage of the same train, and went on to New Cross. At that station she gave the defendant into custody.

*Ballantine*, Sergt., and *Ribton* (for the defence), contended that on this state of facts, the case was not triable at the Central Criminal Court. The assault took place in the county of Sussex, and in no other place was there jurisdiction, therefore, to try it.

*Robinson* (for the prosecution), referred to the 7 Geo. 4, c. 64, s. 13, by which it was enacted that in indictments for felonies or misdemeanors committed upon any person, or on, or in respect of any property in or upon any coach, cart, or other carriage whatso-

(a) Reported by B. C. ROBINSON, Esq., Barrister-at Law.

ever, employed in any journey, or on board any vessel whatsoever employed in any voyage or journey upon any navigable river, canal, or inland navigation, the venue may be laid in any county through which the coach, &c., or vessel shall have passed in the course of the journey or voyage during which the felony or misdemeanor was committed, in the same manner as if it had been actually committed therein. New Cross was in the county of Kent, and inasmuch as there was one single journey here between Brighton and New Cross, and the assault was committed in the course of that journey, the indictment might be preferred and tried in the county of Kent. Then by the 4 & 5 Will. 4, c. 36, s. 2, certain portions of the county of Kent, of which New Cross was one, were declared to be within the jurisdiction of the Central Criminal Court, and all offences triable within the specified portions of that county, were made triable in this court. It is obvious, therefore, that this indictment may be tried here.

*Ballantine*, Sergt., and *Ribton* (in reply), then contended that the 7 Geo. 4, c. 64, had no application to railway trains, which were not contemplated when that act was passed. They could not come within the description of coach, cart, or other carriage, as mentioned in the act. At all events, if this were otherwise, the transitus, as far as this case was concerned, was at an end as soon as the parties separated at the Three Bridges, and the prosecutrix got into another carriage. As to her and the defendant, the journey could not be said to be performed in the same coach, cart, or other carriage. Again the act said that the offence might be tried in any county through which the coach, &c., "*should have passed*," which words clearly referred to a time antecedent to the offence committed, so that, although the indictment might be tried in any county through which the train had passed up to the time of the alleged offence, it could not be tried in any one through which it passed afterwards.

The RECORDER.—I think that by the combined operation of the 7 Geo. 4, c. 64, and the Central Criminal Court Act, this indictment is properly preferred and tried in this court. There is here but one journey, and although the carriages are distinct, they all form but one conveyance. The fact that the prosecutrix and the defendant rode in different carriages after the assault was committed does not appear to me to affect the question. It is the same as if they had occupied different parts of one and the same carriage. As to the interpretation sought to be put on the words, "*through which any carriage shall have passed*." I cannot think it has any foundation. The words clearly speak with reference to the time of the trial, and not to the time when the actual offence was committed. Any place within the limits of the beginning and end of this journey may be taken to be the venue, in whatever part of the journey the assault took place.

*Guilty.*

*Robinson*, for the prosecution.

*Ballantine*, Sergt., and *Ribton*, for the defence.

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## NORTHERN CIRCUIT.

LANCASTER SUMMER ASSIZES, 1859.

(Before BARON WATSON.)

REG. v. BRAITHWAITE.

*Perjury—Evidence—Contradiction.*

*Although it is not now necessary that the alleged perjury should be proved by two witnesses in contradiction of the prisoner, it is still requisite that the perjury should be proved by something more than the mere contradictory oath of the prosecutor. He must be corroborated by some independent testimony.*

*Where, therefore, the alleged perjury was, that the prisoner had sworn that he had paid certain sums of money on certain days, and that he had never said that certain packages contained a certain sum of money, and he was contradicted only by the denial of the prosecutor :*

*It was held (after consultation with HILL, J.), that there was not evidence to go to the jury.*

**G**EORGE BRAITHWAITE was indicted for wilful and corrupt perjury before Mr. J. J. Lonsdale, the County Court judge of North Lancashire, on the 26th day of July last.

*Campbell Foster* prosecuted, and *Kay* defended the prisoner.

It appeared from the opening statement that the prisoner is a corn miller at Heathorne, near Clitheroe, and the prosecutor, Joseph Bland, was a workman in his employment, earning wages of 1*l.* a-week. For nearly a year the prosecutor did not draw his wages, and on the 13th of December last, on coming to a settlement with his master, the prisoner, 50*l.* were owing to him on account of wages, for which the prisoner gave him a memorandum, or acknowledgment of that amount being due to him. He went on working for the prisoner till April, who paid him his wages subsequent to the 13th of December, and then the prosecutor left his service. Having many times applied in vain for payment of the 50*l.* due to him, and having only received 2*l.* on account, the prosecutor at last took out a summons in the County Court at Clitheroe to recover the balance of 48*l.* due to him. The plaint was fixed for hearing on the 26th of July. The day before the

prisoner called on the prosecutor and asked him to walk home with him, and on arriving at the prisoner's house the prisoner said he would pay him, and asked him to sign a receipt on the particulars of demand delivered with the summons from the County Court. The prisoner then gave the prosecutor two packages of silver, which he said contained 13*l.* each, a loose package, which he said contained 6*l.* in silver, and sixteen sovereigns, making altogether, as the prisoner alleged, 48*l.* The prosecutor took it without counting it, and carried it to a Mrs. Watson's, where he was stopping, and counted it over. He then found that the loose package of silver contained only 5*l.*, and that the other packages contained only 10*l.* each, and that he had been paid 7*l.* short. He went back and complained to the prisoner, who refused to hear him or alter the payment. Next day the prosecutor met the prisoner in the streets of Clitheroe, and told him he should go on with the plaint and would have his 7*l.* The prisoner persisted that he had paid him the full amount as stated. On going before the County Court judge the prisoner swore that he had paid the whole amount alleged to be due—namely, 42*l.*—the day before, and two sums of 4*l.* and 2*l.* previously; and swore that he had never said the two packages of silver contained 13*l.* each, or that the loose package contained 6*l.* The prosecutor denied the payment of the two sums on account, and the prisoner had no vouchers or entries of these payments. The County Court judge disbelieved the prisoner, and gave judgment for the plaintiff.

The only corroboration of the testimony of the prisoner was the evidence of Mrs. Watson, who counted the money; as to all the rest of the evidence, it was simply the oath of the prosecutor against the oath of the prisoner.

*Kay* submitted that this was not enough, and that the evidence of the woman Watson was really founded on the evidence of the prosecutor, and was not independent corroborative testimony.

His LORDSHIP having consulted Mr. Justice HILL, said, that both Mr. Justice Hill and himself were of opinion that this evidence was not sufficient to go to a jury to convict the prisoner of perjury. The old law required two witnesses to contradict a prisoner charged with perjury on a material fact; but that rule was now exploded, and it was held that it must be the oath of a witness and something more—some independent and corroborative testimony. Here there was no other evidence independent of the prosecutor's, and he must, therefore, direct an acquittal.

*Not Guilty.*

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Perjury.

## OXFORD CIRCUIT.

## STAFFORD SUMMER ASSIZES.

(Before Mr. Justice BYLES.)

REG. v. VAUGHAN. (a)

*Causing to be taken a dangerous or noxious thing—9 & 10 Vict.  
c. 25, s. 4.*

GEORGE VAUGHAN was indicted under the above section, for unlawfully causing to be taken by one Mary Ann Gregory, a certain dangerous or noxious thing called cantharides with intent to do grievous bodily harm.

There was another count for laying the intent to murder.

On that count, BYLES, J. held there was no evidence to go to the jury. He also doubted whether the offence was within the section of the act; being under the impression that the 4th section of the 9 & 10 Vict. c. 25, only applied to the administration by another, and not to the voluntary taking by the patient.

*Pritchard* (for the prosecution), submitted that the words "to be taken" might be referred to "dangerous or noxious thing," *referendo singula singulis*, and that the words "cause to explode, send or deliver to," might be referred to "any explosive substance."

BYLES, J., after consulting Mr. Justice WILLES, said "that the latter might be considered the true construction, but that the intent must be proved.

It appeared from the evidence that the prosecutrix was on intimate and friendly terms with the prisoner; that on the evening of the 6th of April, the prisoner gave her some rum to drink, that she was taken ill immediately afterwards; that the doctor who was called in, discovered four to seven grains of cantharides on the sides of the glass out of which she had been drinking, and proved the symptoms exhibited by her to be such as are produced by cantharides. On cross-examination it appeared that the prisoner had partaken of the rum, and also of some castor oil which had been sent for for the prosecutrix, and which he paid for.

It was proved that cantharides was a dangerous poison, and that its effects are well known.

His Lordship intimated his opinion that the case was not a

(a) Reported by J. YEATMAN, Esq., Barrister-at-Law.



strong one, though he would not withdraw it from the jury; who, however, found the prisoner *Not Guilty*, without hearing counsel for the defence.

There was no count for a common assault, and Mr. Justice BYLES intimated that if there had been, the prisoner might have been convicted of the assault at common law, but as this case did not come within Lord Campbell's Act, the prisoner must be acquitted of the whole.

*Pritchard*, for the prosecution.

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*Administering  
with intent, &c.*

## COURT OF CRIMINAL APPEAL.

November 19, 1859.

(Before POLLOCK, C.B., WILLIAMS, J., CROWDER, J.,  
CHANNELL, B., and HILL, J.)

REG. v. CHARLOTTE EVANS.(a)

*False pretences—Passing note of a non-existing bank—Guilty knowledge.*

*The prisoner tendered, in 1859, a five-pound note of a bank which had long ago stopped payment and in 1852 paid a dividend, and obtained change to the full amount. At the close of the prosecution it was objected by counsel for the prisoner, that there was no proof of the allegation in the indictment, that the note was not good, or of the value of five pounds, or of any value. The judge told the jury that there was some evidence from which they might infer that the note was not of any value. The jury found the prisoner guilty:*

*Held, that the question was not properly left to the jury; that the question of value was an immaterial one, and that simply producing the note and leaving it to tell its own story did not constitute a false pretence, and that therefore the conviction could not be sustained.*

CASE reserved for the opinion of this court by the Chairman of the Glamorganshire Quarter Sessions.

Charlotte Evans was indicted at the Michaelmas Quarter Sessions, 1859, for the county of Glamorgan, for falsely pretending that a piece of paper was a bank-note then current, good, and of the value of five pounds, by which false pretence she did unlawfully obtain from one Mary Miles certain money, with intent to

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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defraud; whereas, in fact, the said piece of paper was not a ~~bank~~ note then current, or good, or of the value of five pounds, or of any value whatever, as the said Charlotte Evans at that time well knew.

It appeared in evidence that the prisoner on the 20th of July, 1859, tendered to one Sarah Thomas a piece of paper purporting to be a five-pound note of the Newport Old Bank, and obtained change to the full amount of five pounds. There was no question as to the identity of the note or of the prisoner; but to prove the allegation in the indictment that the said note was of no value, Mr. John Parry Morgan was called, who stated that he was now cashier of the West of England Bank at Cardiff; that he remembered the Newport Old Bank; that that bank does not now exist; that he saw the doors of it shut; that it was a private bank, and paid a dividend of two shillings and fourpence in the pound in the year 1852 or 1853; that he knows Newport, which was the place where the bank named in this note transacted its business, and that there is no such bank to which it could be presented.

It was also proved by David Jones, who was one of the several parties to whom this note was transferred for value, after it was changed for the prisoner, that he went to a bank in Merthyr Tydvil, and there tendered it, but did not get change for it.

It was objected on behalf of the prisoner, that the above was not sufficient evidence to go to the jury in support of the allegation that the note was not good, or of the value of five pounds, or of any value whatever.

I overruled the objection, and told the jury that I thought there was some evidence from which they might infer, if they thought fit, that the note was not of any value, and read to them the evidence of the witnesses above referred to *verbatim*.

The prisoner was convicted, and sentenced to four months' imprisonment with hard labour, subject to a case for the opinion of the court above, as to whether there was sufficient evidence before the jury to sustain the allegations in the indictment as above stated.

JOHN COKE FOWLER,  
Vice-Chairman and Stipendiary Magistrate.

*Hardinge Giffard* (for the prisoner).—The conviction cannot be supported. The case of *Reg. v. Williams* (7 Cox Crim. Cas. 351), is in point. There the prisoner was indicted for falsely pretending that a certain promissory note of the Newport Old Bank was a good and valid note (he well knowing that the said bank had long before stopped payment); and the evidence was, that the prisoner, was drinking in a public-house, and said that he would pay for a gallon of beer, if any one would change a 5*l.* note for him; that the prosecutor handed over 5*l.* in exchange for the note, which the prisoner assured him was a good one; that the prisoner on being taken into custody, said that he had taken the note at Abergavenny, and had afterwards heard that the bank had stopped, and that the bank stopped payment in October, 1851. Upon this evidence,

Martin, B., after consulting Bramwell, B., ruled that the prisoner could not be convicted, observing that the estate might pay twenty shillings in the pound. So also in the present case, there was no evidence to show that the note was of no value.

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POLLOCK, C.B.—I am of opinion that the conviction is bad. The question seems to have gone to the jury with the direction that there was evidence on which they might find that the note was of no value. Very likely the case might have been put to the jury so as to sustain a conviction; but, as the matter now comes before us, the conviction cannot be supported. As my brother Crowder, J., has suggested, if the prisoner had represented the note to be of the value of 5*l*. when she knew it was not of that value, she might have been guilty of false pretences; but by simply producing the note and letting it tell its own story, she is not. The conviction must therefore be quashed.

*False pretences*

WILLIAMS, J.—I am of the same opinion. As the case is submitted to us, I think that the conviction was not right. I wish to guard myself, however, from being supposed to intimate that there may not be an indictment for false pretences, which might be supported by proving, that the party charged had induced the prosecutor to believe that the note was the note of a bank open and solvent, when she knew that the bank had, in fact, stopped payment.

CROWDER, J.—I also think that it does not appear from the case before us, that the case was properly left to the jury. It was an immaterial question for the jury to determine whether the note was of any value, and to tell them that there was evidence from which they might infer that it was of no value. It is quite sufficient to sustain the charge of false pretences if a person knowingly presents the note of a bank which has stopped payment, as a current note, though there may be a dividend afterwards, and a great portion of the value paid.

CHANNELL, B.—I also think that this conviction cannot be sustained. The evidence is not very clearly stated. I agree that another and different question might have been put to the jury, and their finding upon it might have supported a conviction; but upon the evidence as stated to us the conviction cannot be supported.

HILL, J. concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

January 21, 1860.

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ.,  
WATSON, B., and HILL, J.)

REG. v. CHARLES HUNTLEY. (a)

*Larceny and receiving — Indictment — “Stolen as aforesaid” —  
Surplusage.*

*The prisoner was indicted in the first count for larceny of certain goods ; and in the second count for that he “ the goods aforesaid, so as aforesaid feloniously stolen,” feloniously did receive, &c. The prisoner was acquitted on the first count, but found guilty upon the second : Held, that the conviction was valid, and that the second count might be construed to mean stolen goods generally ; and the part of the first count charging them to have been stolen by him, be treated as irrelevant.*

Case reserved for the opinion of this court by the Recorder of Winchester.

The prisoner was tried before me, as Recorder of Winchester, at the Epiphany Sessions 1860.

The indictment was as follows :—

City of Winchester, ) The Jurors for our Lady the Queen, upon  
to wit. ) their oath present, that Chas. Huntley, late  
of the parish of St. Maurice, in the city of Winchester, on the 6th  
day of December, in the 23rd year of the reign of our Sovereign Lady  
Victoria, by the grace of God of the United Kingdom of Great  
Britain and Ireland, Queen, Defender of the Faith, with force and  
arms, at the parish of St. Thomas, in the city aforesaid, twenty  
yards of tweed of the value of 3*l.*, of the goods and chattels of  
John Gadd, then and there being found, feloniously did steal, take  
and carry away, against the peace of our said Lady the Queen,  
her crown and dignity.

And the jurors aforesaid, upon their oath do further present,  
that Chas. Huntley, late of the parish aforesaid, in the city aforesaid, afterwards, to wit, on the 6th day of December, in the year  
last aforesaid, at the parish aforesaid, in the city aforesaid, the  
goods and chattels aforesaid, of the value aforesaid, so as aforesaid

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

feloniously stolen, taken and carried away, feloniously did receive and have, the said Chas. Huntley then and there well knowing the said goods and chattels last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Before the prisoner pleaded, his counsel moved to quash the second count, on the ground that by reference to the first count it must be read as charging a felonious receiving by the prisoner of goods then stolen by him the said prisoner, the words "so as aforesaid stolen" being referable to the first count, which states the goods to have been stolen by the said prisoner, and it was contended that the count being so read was bad, as a prisoner cannot be said to have feloniously received goods stolen by himself; and *Reg. v. Perkins* (5 Cox Crim. Cas. 554), was referred to, in which it was held that where the evidence is sufficient to convict the accused of stealing, there is no option to treat him either as a thief or a receiver.

The objection was renewed *pro forma* at the close of the prosecutor's case, when it was objected that there was no evidence to support the second count on the same ground as above stated, viz., that the prisoner could not be found to have received goods stolen by himself.

The prisoner was acquitted on the first count of the indictment, but found guilty upon the second count.

I reserved the objection for the consideration of the judges.

Judgment stands postponed on this indictment, and the prisoner remains in gaol, having been sentenced to nine months' imprisonment on another indictment.

A. J. STEPHENS.

No counsel appeared either for the prosecution, or the prisoner.

ERLE, C.J.—We are all of opinion that the conviction of the prisoner for receiving ought to be affirmed. It was urged on the prisoner's behalf that, inasmuch as if he stole the goods, he could not be convicted of receiving them, knowing them to have been stolen; so where the first count of the indictment charged him with having stolen the goods, of which offence he was acquitted, and the second count charged him with receiving the goods "so as aforesaid stolen," he could not be convicted on that count. But we are of opinion that the words "so as aforesaid stolen" in the second count, may be construed to mean "stolen goods" generally, and that the part of the first count charging them to have been stolen by the prisoner, may be treated as irrelevant for the purpose of the second count.

*Conviction affirmed. (a)*

(a) The same point was determined in *Reg. v. Craddock* (4 Cox Crim. Cas. 409), but there the objection was not taken till after the verdict, whereas in the present case it was taken before plea and also at the close of the evidence for the prosecution and before verdict.

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## COURT OF CRIMINAL APPEAL.

January 21, 1860.

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WATSON, B., and HILL, J.)REG. v. THOMAS GOSS. (a)  
REG. v. JOSEPH RAGG. (a)*False pretences—Sale by sample—False representation of quantity—  
7 & 8 Geo. 4, c. 29, s. 53.**A wilful misrepresentation of a definite fact with intent to defraud,  
cognisable by the senses—as where a seller represents the quantity of  
coals to be fourteen cwt., whereas it is in fact only eight cwt., but so  
packed as to look more; or where the seller, by manœuvring, con-  
trives to pass off tasters of cheese as if extracted from the cheese  
offered for sale, whereas it is not—is a false pretence, indictable  
under the 7 & 8 Geo. 4, c. 29, s. 53.*

REG. v. THOMAS GOSS.

CASE reserved for the opinion of this court by the Recorder  
of Northampton.

The prisoner, Thomas Goss, was tried before me at the last Michaelmas Sessions for the borough of Northampton, for obtaining money by false pretences.

The first count of the indictment stated that the prisoner, having in his possession divers pounds' weight of cheese of little value and inferior quality, and contriving and intending to cause it to be believed that the said cheese was of good flavour and excellent quality, and also having in his possession divers pieces of cheese called "tasters" of good flavour, taste and quality, and contriving and intending to cheat one Thomas Roddis out of his money, then and there unlawfully, knowingly, and designedly did falsely pretend to Roddis, that the said pieces of cheese, called "tasters," which he Thomas Goss then and there delivered to Roddis, were part of the said cheese the said Thomas Goss then offered for sale, and that the said cheese was of good and excellent quality, flavour and taste, and that every pound weight was of the value of fourpence halfpenny, by means of which said false pretence the said Thomas Goss did then and there unlawfully and fraudulently obtain of and from the said Roddis the sum of three pounds nineteen shillings and sixpence with intent to cheat

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

and defraud him of the same, whereas the said pieces of cheese which the said Thomas Goss delivered to Roddis were not part of the said cheese which the said Thomas Goss offered for sale, and whereas the said cheese which the said Thomas Goss offered for sale was not of good and excellent quality, flavour and taste, and whereas every pound weight of the said cheese was not of the value of fourpence halfpenny, which the prisoner well knew.

The second count of the indictment was in the same form as the first, excepting that it did not charge that the prisoner designated the samples as "tasters," and that it contained and negatived an additional false pretence, that the cheese offered for sale was of the same quality, flavour, and taste as the samples.

The third count stated that the prisoner had in his possession divers pieces of cheese with intent to defraud, and delivered the same to Roddis, and unlawfully, &c., did falsely pretend to him that they were and had been taken from, and were and had formed part and portion of certain cheeses which the prisoner then and there offered for sale, by means of which, &c., the prisoner did unlawfully, &c., obtain, &c., with intent to defraud, &c., whereas, &c. (negating the pretence).

The fourth count stated that the prisoner unlawfully, &c., did falsely pretend to Thomas Roddis, that certain pieces of cheese which he then and there delivered and exhibited to Roddis were, and had been taken from, and were and had formed part and portion of certain cheeses, which the prisoner then and there offered for sale to him, by means of which, &c., the prisoner did then and there obtain, &c., with intent, &c., whereas, &c. (negating the pretence).

It was proved at the trial that the prosecutor, Thomas Roddis, on the 19th September last, was attending the cheese fair, held within the borough of Northampton, and that the prisoner was in the fair, and sold to the prosecutor eight cheeses, weighing 1 cwt. 3 qrs. 1 lb., for which the prosecutor paid the prisoner the sum of 3*l.* 19*s.* 6*d.*, being at the rate of 4½*d.* per pound. On the prosecutor going into the fair, the prisoner offered to sell him the eight cheeses, and bored six of them with a cheese-scoop, and then produced and offered to the prosecutor several pieces of cheese, which are called "tasters," successively at the end of the scoop for the prosecutor to taste, and in order that he might taste them as being respectively samples and portions of the six cheeses which the prisoner had bored; and accordingly the prosecutor did taste them, and then offered the prisoner 4½*d.* per pound for the eight cheeses, which the prisoner accepted.

The tasters, however, had not in fact been extracted from the cheeses offered for sale, for after the prisoner had bored the cheeses, and before he handed the tasters to the prosecutor, he took from his coat pocket pieces of cheese of better quality and description than those taken from the cheeses which he had bored, and privily and fraudulently put these pieces of cheese at and into the top of the scoop for the prosecutor to taste, and the cheese

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which the prosecutor did taste, was not any portion of the six cheeses which the prisoner bored.

The prosecutor, at the time he bought the eight cheeses, believed that he had been tasting a portion of those cheeses, and in that belief bought them, and paid the prisoner the 3*l.* 19*s.* 6*d.* for them, which he would not have done unless he had believed that the tasters had been extracted from the cheeses which he so bought. The cheeses were delivered to the prosecutor, and he retained possession of them up to the trial.

The value of the eight cheeses would be about 3*d.* per lb.

The prisoner's counsel at the trial objected that there was no evidence to support the indictment, or of any facts which would constitute a false pretence within the statute.

I left the case to the jury, and the prisoner was convicted; but having some doubt as to whether the case of *Reg. v. Abbott* (2 Cox Crim. Cas. 430), had not been shaken by subsequent decisions (see *Reg. v. Bryan*, 7 Cox Crim. Cas. 312), I reserved the case for the opinion of the Court of Appeal.

JOHN H. BREWER.

No counsel was instructed to argue on behalf of the prosecution.

*Merewether* (for the prisoner).—This case was reserved in consequence of the remarks of some of the judges upon the case of *Reg. v. Abbott* (2 Cox Crim. Cas. 430), which was decided upon the authority of *Reg. v. Kenrick* (5 Q. B. 49). The facts in the present case are precisely the same as in *Reg. v. Abbott*; and unless that case can be impeached, this conviction must, no doubt, be upheld. In *Reg. v. Roebuck* (7 Cox Crim. Cas. 126), Lord Campbell, C.J., said: "If this were *res integra*, I should not agree with *Reg. v. Abbott*, because I think that there the intention of the prisoner was to obtain a better bargain, and not *animo furandi*; but that having been decided by ten judges, I do not wish on the present appeal to disturb it." So in *Reg. v. Eagleton* (6 Cox Crim. Cas. 559), the authority of *Reg. v. Abbott* and *Reg. v. Kenrick* was much disputed in the course of the argument; but the court said that it did not then become necessary to consider those cases. In *Reg. v. Bryan* (7 Cox Crim. Cas. 312), the defendant, in order to obtain a loan on a quantity of plated spoons, represented to a pawnbroker that they were of the best quality, and were equal to Elkington's A (meaning spoons and forks made by Elkington, and stamped with the letter A); that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them the loan was obtained. Held (Willes, J., and Bramwell, B., *dissentientibus*) that the conviction was wrong, and that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence within the statute. In *Reg. v. Sherwood* (7 Cox Crim. Cas. 270),



the prisoner, after he had agreed with the prosecutor to sell and deliver a load of coals at a certain price per cwt., falsely and fraudulently pretended that the quantity which he had delivered was 18 cwt., and that it had been weighed at the colliery, and the weight put down by himself on a ticket which he produced, he knowing it to be 14 cwt. only, and thereby obtained an additional sum of money; and this was held to amount to a false pretence within the statute. In that case a difficulty was felt by the court in drawing the line between indictable and non-indictable false representations.

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The COURT said that they had no doubt about *Reg. v. Abbott* being a decision that they would act upon, and sound in principle, but they desired the case of *Reg. v. Joseph Ragg* (being on the same subject), to be called on before giving judgment.

### REG. v. JOSEPH RAGG.

Case reserved for the opinion of this court by the Chairman of the Leicestershire Quarter Sessions.

Joseph Ragg was tried before me at the General Quarter Sessions of the peace for the county of Leicester, held on the 3rd January, 1860, for obtaining money under false pretences from Henry Harris.

The indictment stated the pretence to be, a false pretence as to the character and weight of a quantity of coals, sold and delivered by the prisoner to the prosecutor.

It appeared in evidence as follows:—The prisoner was a coal dealer. On the 28th November he called at the house of the prosecutor in Loughborough, with a load of coals in a cart, and inquired if he (the prosecutor) wanted to buy a load of "Forest" coal. The prosecutor replied that the coals did not look like Forest coal, because they looked so dull. The prisoner replied, "I assure you they are Forest coal, and the reason of their looking so dull is because they have been standing in the rain all night; there is 15 cwt. of them, for I paid for 14 cwt. at the coal-pits, and they gave me 1 cwt. in." On this the prosecutor bought the coal, and paid 7s. 6d. for the load. The prisoner unloaded the cart, and packed the coals in the prosecutor's coal-place. When the prosecutor saw the coals in the coal-place, they appeared to be much too small a quantity to weigh 15 cwt., and he had them weighed, when it was found that they weighed 8 cwt. only.

The prisoner had at this time received his money and gone away, but the prosecutor went after him, challenging him with the fraud, and asking for redress. The prisoner, however, refused to make any, stating "that he did not make childish bargains, and that the prosecutor could not do anything to him, because he had not sold the coal by weight but by the load."

The prosecutor stated that he had bought the coal on the

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representation of the prisoner that there were 15 cwt., and the size of the cart and the appearance of the coal therein, warranted the belief that there were 15 cwt.; but it turned out that the coal was loaded in a particular manner, technically known as "tunneling;" that is, the coal (which is in large lumps) is so built up in the cart, that one lump rests on the edges of that below it, and large spaces are left between the lumps of coal, and thus there is an appearance of a greater quantity of coal than there actually is.

From further evidence, it appeared that the coal was not Forest coal at all, and had not been bought at the pits, but was Rutland coal, and bought that same morning at a wharf in the town of Loughborough; that the cart, when loaded at the wharf, had weighed 8 cwt. only, and although the prisoner stated that other coal had been added to it from another cart-load purchased at the same time from the wharf, there was no evidence of this produced at the trial.

It further appeared that on the same day, and a very short time after the coal was sold to the prosecutor, the prisoner had offered the same load to another person as containing 13 cwt., but on looking at the cart it was evident that the coal was "tunnelled," and the prisoner was then and there challenged with the fact, and told that there was not above 8 cwt. in the cart, or 10 cwt. at the most.

The prisoner was not defended by counsel, and the jury found him guilty.

With respect to the false pretence as to the "character" of the coal, it appeared to me, on inquiring of the witnesses, that there was not much real difference in value between the Forest coal and the Rutland coal, and that the preference of one over the other was rather according to the idea of the customer, than the actual value of the article; and I should not have considered it a case of false pretences under the statute had this been the only misrepresentation; but I considered that the evidence showed, not merely a false statement as to the quantity, but a preconceived intention to defraud, and a mode of packing the coal, resorted to for the purpose of fraud, and that therefore the jury properly found the prisoner guilty.

On referring, however, to the case of *Reg. v. Sherwood*, I found that some of the learned judges who gave judgment therein had apparently drawn a distinction between the case of a false representation made during the bargaining, and that made after the sale was completed; and in the present case, "as the false pretence was made in the course of the progress of a sale," I did not feel justified in sentencing the prisoner until the subject had come under the consideration of the judges. I therefore postponed the sentence, and directed that the prisoner might be liberated on bail to appear and receive sentence at the next Easter sessions.

HY. J. HOSKINS, Deputy Chairman.

No counsel were instructed either for the prosecutor or prisoner.

ERLE, C.J.—We are all of opinion that the conviction in each case was right. With reference to the case of Joseph Ragg, there was a false representation that the quantity of coals in the cart was 15 cwt., whereas only about 8 cwt. were delivered, and there was a pretence of a delivery of 7 cwt., no part of which had been delivered. And although the falsehood was only as to part of the entire quantity to be delivered, yet this falls within the class of cases of false representations as to the quantity of goods delivered, the principle of which is a false pretence of a matter of fact cognisable by the senses, which is an indictable offence within the statute. With regard to the case of Thomas Goss, there was also a false pretence of a matter of fact within the cognisance of the senses; for by a sample which he falsely represented as a part of the very cheese to be sold, but which was part of a cheese altogether different both in substance and value, he procured the purchaser to buy the inferior cheese, and part with his money. That was a false pretence as to the substance of the article for sale, whereby the prisoner was enabled to pass off a counterfeit article as and for the genuine substance. In *Reg. v. Roebuck*, (7 Cox Crim. Cas. 126), it was held that falsely representing to a pawnbroker that a chain is silver, the prisoner knowing it to be a base metal, is indictable. So here the drawing from the prisoner's pocket, samples from another cheese, and not the cheese intended for sale, which was a totally different substance, and falsely pretending to the purchaser that those samples were part of the substance which he was to buy, that is equally an indictable offence within the statute, and falls within the class of cases to which belong *Reg. v. Abbott*, where the substance of the purchase was a cheese of the identical character with the taster; and *Reg. v. Dundas* (6 Cox Crim. Cas. 380,) where the article sold was falsely pretended to be Everett's blacking, which was a known article in the neighbourhood, whereas in fact the article passed off was a counterfeit. In the case of *Reg. v. Bryan*, the case of the plated spoons represented as equal to Elkington's A, the Judges who constituted the majority decided that case on the principle, that indefinite praise on a matter of opinion, is not within the limit of indictable offences. A great deal of dissatisfaction has been expressed with that decision, as if it must operate as an encouragement to falsehood and fraud, and so lead to a great deal of mischief; but it should be recollected what an extreme calamity it is to a respectable man, to have to stand his trial at a criminal bar as a cheat, upon an indictment at the instance of a dissatisfied purchaser. It is easy for an imaginative person to fall into an exaggeration of praise upon the sale of his goods. And if such statements are indictable, a person who wishes to get out of a bad bargain made by his own negligence, might have recourse to an indictment, on the trial of which the vendor's statement on oath would be excluded, instead

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of being obliged to bring an action, where each party would be heard on equal terms. It is of great public importance to endeavour to draw the line distinctly between false representations which are indictable, and those which are not. In the present case there was a false representation that an article was a genuine substance, and the passing off a counterfeit substance, and that was an indictable offence. My brother Willes, J., in *Reg. v. Bryan*, threw a great deal of light on the law as to false pretences, and though he differed from the majority of the judges in the decision, he did not differ from the principle of that decision, but only upon the application of that principle to the case. The majority of the judges thought the representation there to be a matter of opinion only; my brother Willes thought it a representation of a matter of fact, as if the representation had been, there is as much silver in the spoons as in Elkington's A, and in his judgment it was the false representation of a definite fact. We are therefore of opinion that this conviction must be affirmed.

WIGHTMAN, J. — I am of the same opinion. I would merely add, with reference to the Cheese cases and Elkington's case, one observation. If the prisoner had said that the cheeses were equal to the tasters produced, that would have fallen within the Elkington's case; but he said to the prosecutor, "These tasters are a part of the very cheeses I propose to sell to you;" and therefore it was a misrepresentation of a definite fact.

The rest of the court concurring.

*Convictions affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 21, 1860.*(Before EBLE, C.J., WIGHTMAN and WILLIAMS, JJ.,  
WATSON, B., and HILL, J.)

REG. v. WILLIAM LESLIE. (a)

*Assault and false imprisonment—Indictment—English captain contracting to bring banished foreigners to England—Misdemeanor.**The master of an English vessel contracted with the Chilian Government to convey Chilian subjects from Valparaiso to Liverpool, and they were put on board under duress, and so conveyed against their will.**Held, assuming that the master could justify what he did within the Chilian jurisdiction, yet, after the vessel passed out of it, he was guilty of a wrong amounting to a false imprisonment.*

CASE reserved by Watson, B. at the Christmas Assizes at Liverpool.

The prisoner was the master of the British ship *Louisa Braginton*, and the charge against him was for the false imprisonment of several Chilian subjects during a voyage from Valparaiso to Liverpool.

These persons having been ordered to be banished from Chili by the Government of that country, were brought by force, guarded by soldiers of that state, on board the ship, whence the prisoner, under a contract (a copy accompanies this case) with the Chilian Government, carried and conveyed these Chilian subjects to Liverpool.

On this evidence I directed a verdict of guilty, reserving the question of law, whether or not the defendant was liable to an indictment in this country, under the circumstances, for the opinion of this court.

W. H. WATSON.

## ABSTRACT OF INDICTMENT.

First count.—For assaulting Benjamin Vicuna MacKenna, Angel Custodio Gallo, Manuel Antonio Matta, and Guillermo Matta, on the 10th March, 1859, on the high seas, and falsely and

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law

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vict foreigners  
to England as  
prisoners.

without legal authority or justifiable cause, imprisoning and detain-  
ing them for ninety-eight days then next following.

Second count.—Common assault on them.

Third count.—Like the first, but confining it to Benjamin  
Vicuna MacKenna.

Fourth count.—Common assault on him.

Fifth count.—Like the first, but confining it to Angel Custodio  
Gallo.

Sixth count.—Common assault on him.

Seventh count.—Like the first, but confining it to Manuel  
Antonio Matta.

Eighth count.—Common assault on him.

Ninth count.—Like the first, but confining it to Guillermo  
Matta.

Tenth count.—Common assault on him.

Eleventh count.—Attempting to assault Benjamin Vicuna  
MacKenna, and thereby to occasion him grievous bodily harm.

Twelfth count.—Like the 11th, Angel Custodio Gallo.

Thirteenth count.—Like the 11th, Manuel Antonio Matta.

Fourteenth count.—Like the 11th, Guillermo Matta.

Fifteenth count.—Conspiring, with others unknown, violently  
and against the consent of the said Benjamin Vicuna MacKenna,  
Angel Custodio Gallo, Manuel Antonio Matta, and Guillermo  
Matta to carry and convey them on board a British ship, called the  
*Louisa Braginton*, from the port of Valparaiso across and upon the  
high seas to the realm of England, and to force and compel them to  
be and remain, without and against their consent, on board the  
said ship on the high seas, and during the voyage, and unlawfully  
to imprison and detain them on board the said ship during the  
said voyage, and upon the high seas. That, in pursuance of such  
conspiracy, the said persons unknown brought the said Benjamin  
Vicuna MacKenna, Angel Custodio Gallo, Manuel Antonio  
Matta, and Guillermo Matta, and caused them to be violently and  
against their wills, and without their consent, brought to and  
on board of the said ship, which was then lying in the port of  
Valparaiso, and on the high seas. That prisoner, in pursuance of  
the said conspiracy, then received and took them on board the  
said ship, he being then the master and commander thereof, it  
being then a British ship, and within the jurisdiction of the  
Admiralty, and prisoner knowing that they were so brought on  
board against their wills, and without their consent. That prisoner,  
in pursuance of the said conspiracy, caused the ship, with them on  
board, to leave the port of Valparaiso and proceed on her voyage  
to England, and to sail across the high seas, and to bring them,  
against their wills and without their consent, across the high seas  
to a port in England, to wit, the port of Liverpool.

Sixteenth count.—Conspiracy, with others unknown, violently  
and against the consent of the said Benjamin Vicuna MacKenna,  
Angel Custodio Gallo, Manuel Antonio Matta, and Guillermo  
Matta, to carry and convey them on board a ship, called the

*Louisa Braginton*, from a port beyond the seas, to wit, the port of Valparaiso, across and upon the high seas, to the realm of England, and to force and compel them to be and remain, without and against their consent, on board the said ship on the high seas and during the said voyage, and unlawfully to imprison and detain them on board the ship during the voyage and upon the high seas.

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## EVIDENCE.

Benjamin Vicuna MacKenna. — I am a Chilian, and until recently I was the editor and proprietor of a newspaper published at Santiago, which is the capital and the seat of the Government. In December, 1858, there was some political difference with the Government. There was a general meeting held at Santiago, on the 8th of December, 1858. We were surrounded by troops and taken to prison in Santiago, with many others, and amongst them the three gentlemen present; two of them are members of the of the House of Representatives. There are about sixty members altogether. We remained in prison about three months. On the night of the 8th of March we were taken to Valparaiso as prisoners. The distance is ninety miles. We were thirty hours on the road; we arrived in Valparaiso on the night of the 9th of March last, still as prisoners. When we got there we were taken to the wharf, the troops came all the distance and surrounded the carriage. The ship *Louisa Braginton* was about a mile from the wharf, and two officers and four soldiers with loaded guns took us on board. I saw two soldiers and the chief officer come on deck, and two remained below; I heard the chief officer speak to the captain in Spanish, he mentioned our names, and pointed us out. The crew consisted of about thirteen men. A brother of mine was allowed by the authorities to come and see me, and also some other friends. We did not know where we were going to but we had our suspicions. My brother wanted me to go on board a man-of-war (a foreign one), but I said I would not do so, as there were armed boats around the ship, and I wished to abide the fate of my friends. The ship was ready to go to sea. The captain afterwards told me the ship had been waiting three days, and that he had received fifty dollars a day for waiting. A war steamer towed the ship out ten miles, and escorted her till day-break. The ship sailed in three hours after I got on board. I was only allowed to speak to my friends in the presence of an officer. We afterwards spoke to the captain, and we told him how we stood. We told him that he had no right to take us to England as prisoners; that the English flag protects every one. We said it was unlawful and shameful, that he was paid four times more than for ordinary passengers, and that it showed he was in a criminal affair. We also said, "Now is the time to amend your wrong, take us to Peru, which is very near. We will pay you the amount Government pays you, and will give you our private provisions. The question of money is no question for us." The captain replied that he was under a contract with the Chilian Government, and was under a penalty of 1500 dollars

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for putting us in at Liverpool; and that he must do it. We then resolved to submit to our fate, hoping that our wrongs would be satisfied in England. This is all that occurred, as near as I can recollect. I often told him of the roughness of his conduct, and that it was worse than the slave trade. He said many times that it was capital business, and that if we would pay him well, he would take the President of Chili to the Cape Horn. When at the Azores, I saw the carpenter making holes in the gig and small boats. We landed at Liverpool on the morning of the 15th of June. Soon afterwards we went to Messrs. North and Simpson and stated our case. There was a boy named Isaac Matta on board, about eleven years of age. He was not a prisoner; he was the brother of one of the gentlemen who was a prisoner. The father paid the passage-money for the boy. Several of our friends (relations) came to see us. One of them in haste provided us that day with provisions for the voyage. When I got on board, I did not say I was glad to get out of the hands of those insulting villains. I did not say I was extremely glad to get away, or anything like it. I did not know the vessel was going to England. I heard a whisper to that effect from the passengers. I did not make any protest on the night we were received about the captain receiving us. If the captain had offered to give us back to the officers, I do not know whether I would prefer going back with them, or to go round the Horn. I perhaps would prefer remaining in my own country. I did not ask to be landed at Valparaiso; I would have preferred going back to Chili, as I did not know where we would be taken to. I do not know whether I would like to have remained with those armed men or not. I first spoke to the captain about putting us on shore the next day, the 11th. We were sick on the first day. Arica is to the north of Valparaiso, about 6°, or about 400 miles. We were about the longitude of Juan Fernandez. We saw it on the 12th. I did not ask to be put on shore there, as we had made up our minds to go to Liverpool. After that we made no application to be put on shore. I asked the captain to put us on shore at Arica; he said he would vitiate the policy of insurance and the terms of the charter-party. I told him any question of money was of no importance to us. The captain tapped me on the shoulder one night, and asked me what we were going to do, and asked me whether we intended to leave the ship. He said, "I know you intend to leave the ship. If you kick, I'll kick." I do not know the precise meaning of those words.

William Hortopp.—I was mate of the *Louisa Braginton*. I remember a conversation with the captain before she left Valparaiso. He said he had entered into arrangements to take home a certain quantity of political prisoners. That was about twenty days before they came. The ship was receiving cargo at that time. We were waiting for them. I do not know that the captain was detained on their account, but I believe there was a kind of demurrage if they did not come within a certain time. I made an entry in the log about it. I remember their coming on board.



They were brought in armed boats, and received on board by a guard of soldiers, who came before them in one boat. The captain was there. The captain gave me a pistol before we left Valparaiso. I was to use it whenever anything wrong occurred. That was before the men came on board, but after the time the captain told me they were coming. He had not given me a pistol before on the voyage out. When we had been about a day out, the captain desired me to load the pistol; that was after coming out of the cabin, after seeing the men he had taken on board. At the Azores, the captain consulted me as to the making holes in the boats to prevent the men getting away. I consented to it. I knocked one hole in the long-boat. I cannot say whether the crew were armed then. At that time I made entries in the log-book. These entries were afterwards torn out of the log-book by the captain's orders. He said the statements were not correct. To the best of my knowledge the statements were correct. I have now got those torn leaves, and now produce them. The captain made fresh entries on a slate and told me to copy them into the log-book. It is my duty, and I usually keep the log-book. At that time the captain walked about armed. I kept the leaves that I tore out of the log-book for my own protection. The captain did not know that I had kept them, I told him that I not got them, and that they were destroyed. The captain objected to my entries because I had written that he had held a "consultation with me," which the captain said was incorrect. I was present when the men were brought on board. I received them. They made no protest to me. Their friends were on board. After their friends went away, they went below, and called for the captain to arrange matters as to where they were to sleep. The guard remained on board some short time. The guard was not there when the vessel started. There were four men in a boat to see that no one came on board our ship. When off the Azores, the captain accused me of knowing the intention of the men. I do not know how the men were treated; I was not living with them, but I believe they were treated like gentlemen. I believe they had everything they asked for. Messrs. Huth, Grunning and Co. are the consignees of the vessel. I knew they were prisoners when they came on board. I do not know whether the four men in the boat had muskets or not.

The counsel for the prosecution called for the contract entered into by the defendant with the Chilian Government.

The document hereto annexed (with translation) was produced by defendant's counsel. The log-book was also produced by defendant's counsel.

Joseph Dickson.—I am an officer in the Liverpool police force. On Friday last, the 17th June, I served a summons upon the defendant for an unlawful assault and imprisonment upon one Benjamin Vicuna MacKenna. He made no remark when I gave it to him. He did not read it, while I was present.

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The following are the material extracts from the ship's log-book:—

"Thursday, May 19, 1859, 4 a.m.—The master came on deck and held a consultation regarding the passengers, which he has a reason to think that something seareous is doing between them, to which i am totally ignorant of anything regarding them.

" WILLIAM HORTOPP.

"Friday, May 30, a.m.—Master held a consultation with me, and concluding with taking a plank from each boat. . . . The master called me below, and desired me to give him every assistance in keeping the command of the ship, to which i readily consented, assuring him i would do everything that laid in my power.

" WILLIAM HORTOPP.

"Saturday, May 21st.—The master keeping the deck, fully armed day and night."

#### TRANSLATION OF CONTRACT.

"It is mutually agreed between his Excellency the Governor of the province of Valparaiso, Jovino Novoa, and William Leslie, master of the British barque, *Louisa Braginton*, the following:—First, the latter obliges himself to receive on board five cabin passengers, to maintain them and convey them to the port of Liverpool. Secondly, the vessel to be ready to sail from this port on the 28th instant, and the charterer to dispatch her before the 5th of March next; the party delinquent will pay to the party observant fifty dollars demurrage for each day's delay after those stipulated. Thirdly, the former obliges himself to pay the latter 3000 dollars cash, for which sum Messrs. F. Huth, Grunning and Co. give a receipt, obliging themselves to return the same amount in case they should not present within eight months from this date, a certificate from the Chilian consul at Liverpool, or other valid document, to prove the landing in Liverpool or any other port in Great Britain of the aforesaid five passengers (the risks of the sea, death, or other fortuitous circumstances always excepted). Fourthly, a penalty of 1500 dollars is stipulated payable by the party delinquent to the party observant, for all that is agreed in this contract, having signed two of one tenor and date, one of which being accomplished, the other to stand void.

"(Signed)

"JOVINO NOVOA.

"WILLIAM LESLIE.

"Witness, P. George Lyon.

"Valparaiso, February 21st, 1859."

*Aspinall* for the prosecution.—The prosecution was instituted for the purpose of having the law declared upon this subject. There is no legal decision bearing upon it. It is submitted that the prisoner's act was unlawful, upon this ground. Although the Chilian Government may lawfully transport Chilian subjects in a

Chilian ship, yet it is an offence in an English subject commanding an English ship to lend his, even in a foreign port, for the imprisonment of Chilian subjects, he not being compellable by the Government of Chili to make his ship a prison; and if he so voluntarily makes himself a party to the duress of Chilian subjects, he is not entitled to justify himself by the orders of the Chilian Government, as a Chilian subject might do. The proceeding, it is submitted, was unlawful in its inception, even if it had been within the confines of the Chilian port. An English vessel, even when within a foreign port, is under the dominion of the laws of the Admiralty of England. The Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 267, provides that every master or seaman shall be liable to proceedings in England for any offences against property or person, committed ashore or afloat, out of her Majesty's dominions. That provision extends to assaults and false imprisonment. In this case the ship was a mile from the port, the prisoners were brought on board under duress, and the defendant voluntarily by his contract made himself a party to the duress by which they were put on board. This was an offence in the captain, he not being compellable to act as he did, and it was one for which he is liable to the Admiralty jurisdiction. [ERLE, C.J.—Assume that the act was lawful as between the prosecutors and the Chilian Government, and that the Chilian Government employed the defendant as their servant to do that act which was, as between the prosecutors and the Chilian Government lawful.] It is submitted that the defendant could not then justify doing the act on board a British ship at sea. [ERLE, C.J.—Would it be a lawful contract for the British Government to employ a Chilian subject to transport persons lawfully convicted?] The question is, whether a man can be justified in conveying persons away under duress, when he is subject to no law, but that of his own country. [WILLIAMS, J.—If the Chilian Government have authority to do the act, can we forbid it to be done by an English subject? Where did the false imprisonment begin?] In the first point of view it commenced the moment the prosecutors were put on board, and in the second point of view the moment the ship passed out of jurisdiction of the Chilian Government. The prosecutors were forcibly taken on board and carried out to sea, and were not in the condition of passengers, upon whom the law casts certain obligations (Abbott on Shipping, c. 8, p. 160), as, for instance, obedience to all reasonable orders of the captain. They were confined and imprisoned within the limits of the ship without their own consent; they were in a state of duress, and by the act of the defendant they were placed in that condition, and the prosecutors would have been justified in seizing the vessel and taking her to what port they pleased, as was actually done by Baron Poerio and his companions under similar circumstances. It would have been an answer to any proceeding that they were escaping from unlawful custody. It would be a disastrous supposition to entertain, that an English ship might be legally placed in such a position that persons so confined like the prosecutors,

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might forcibly take her where they like to escape from custody. [ERLE, C.J.—In *Reg. v. Sattler* (7 Cox Crim. Cas. 431), the question was considered whether the prisoner committed a murder in order to release himself from unlawful imprisonment, or out of pure revenge against the person who had taken him into custody at Hamburgh.] It would be a strong proposition to hold that a person in unlawful custody would not be entitled to release himself. Assuming that it had been physically possible to serve a writ of *habeas corpus* on the defendant immediately the ship passed into the limits of British jurisdiction, it would not have been a good return, that the prosecutors had been banished, and were detained under orders from the Chilian Government.

*Overend* (for the defendant).—All nations have the right to banish their convict subjects to any place they think proper (Vattel, book 1, cap. 19), and it is for the country to which the convicts are sent, to object to receive them. By the 24 Geo. 3, c. 50, s. 1, and 28 Geo. 3, c. 4, the Legislature authorised transportation to places, not only in the King's dominions, but also elsewhere. [WIGHTMAN, J.—Probably new colonies were contemplated by “and elsewhere.”] If the country to which they were sent refused to receive them, the captain must take them back again to Chili. [HILL, J.—You must go the length of contending that if the Chilian Government had ordered them to be conveyed to York, and the defendant had contracted so to convey, he would have been justified in keeping them in custody, and conveying them so, from Liverpool to York.] I cannot contend that; but it is submitted that the contract being lawful in its inception, and the defendant having done nothing at all after the vessel passed out of the Chilian waters but to proceed in his course, he was not liable. [HILL, J.—The defendant was a voluntary agent to bring the prosecutors in the condition of prisoners on board his vessel to England.] Why may not the defendant be considered in the light of a servant to the Chilian Government, acting in obedience to its orders? An Englishman might be engaged as a gaoler at Chili. It is for the country to which they are sent to object to receive them. Why is the defendant a wrong-doer *quoad* these persons? [WILLIAMS, J. referred to *Dobree v. Napier*, (2 Bing. N. C. 781). HILL, J.—The port of destination gives the character to the transaction.] The Chilian Government might hire the defendant to execute people in the Chilian territories, and why not to transport them?

*Aspinall* replied.

*Cur. adv. vult.*

ERLE, C.J.—In this case the question is, whether a conviction for false imprisonment can be sustained upon the following facts:—The prosecutor and others being in Chili, and subjects of that state, were banished by the Government from Chili to England. The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, near Valparaiso, contracted with that Government to take the prosecutor and

his companions from Valparaíso to Liverpool, and they were accordingly brought on board the defendant's vessel by the officers of the Government, and carried to Liverpool by the defendant under his contract. Then can the conviction be sustained for that which was done in Chilian waters? We answer, no. We assume that in Chili the act of Government towards its subjects was lawful; and although an English ship in some respects carries with it the laws of her country in the territorial waters of a foreign state, yet in other respects it is subject to the laws of that state as to acts done to the subjects thereof. We assume that the Government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the Government, and under its authority. In *Dobree v. Napier* (2 Bing. N. C. 781), the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in the time of war. The plaintiff brought trespass, and judgment was for the defendant, because the Queen of Portugal in her own territory had a right to seize the vessel and to employ whom she would to make the seizure, and therefore the defendant, although an Englishman, seizing an English vessel, could justify the act under the employment of the Queen. We think that the acts of the defendant in Chili become lawful on the same principle, and are therefore no ground for the conviction. The further question remains, can the conviction be sustained for that which was done out of the Chilian territory? and we think that it can. It is clear that an English ship on the high seas, out of any foreign territory, is subject to the laws of England, and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil. In *Reg. v. Sattler* (7 Cox Crim. Cas. 431), this principle was acted on so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by foreign writers on international law, among which it is enough to cite *Ortolan sur la Diplomatie de la Mer*, liv. 2, cap. 13. The Merchant Shipping Act (17 & 18 Vict. c. 104, s. 267), makes the master and seamen of a British ship responsible for all offences against property or person, committed on the seas out of Her Majesty's dominions, as if they had been committed within the jurisdiction of the Admiralty of England. Such being the law, if the act of the defendant amounted to a false imprisonment, he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them without their consent over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment. It may be that transportation to

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England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects, but for an English ship the laws of Chili out of the state are powerless, and the lawfulness of the acts must be tried by English law. For these reasons, to the extent above mentioned, the conviction is affirmed.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 21, 1860.*

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ.,  
WATSON, B., and HILL, J.)

REG. v. WILLIAM HUGHES, (a)

*Felony—Accessory before the fact—Conviction after acquittal of the principal—11 & 12 Vict. c. 46, s. 1—General verdict on counts for larceny and receiving by same person.*

*The first two counts of an indictment charged A. and B. with stealing, and the third charged B. with feloniously receiving. A. was acquitted; no evidence having been offered against him, that he might be a witness against B. Upon his and other evidence, which proved that B. was an accessory before the fact of the stealing, the jury found a general verdict of guilty against B., which was so entered up:*

*Held, that the conviction was good, the 11 & 12 Vict. c. 46, s. 1, making an accessory before the fact a principal felon, and that therefore the conviction of the principal is not now a condition precedent to the conviction of an accessory before the fact, and that there was no inconsistency in an accessory before the fact being also a receiver.*

CASE reserved by the Recorder of Manchester.

At the Court of Quarter Sessions holden in and for the city of Manchester, in the county of Lancaster, on the 2nd January, 1860:

John Hall and Henry Hughes were tried before me on the annexed indictment; both pleaded not guilty.

After the jury were charged, the learned counsel for the prose-

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

cution said he did not propose to offer any evidence against Hall, and applied to have him acquitted, in order that he might be examined as a witness; and on his assuring me that, in his judgment, that course would serve the ends of justice, I acceded to it, and Hall was acquitted, and called as the first witness.

He had been thirteen months in the service of the prosecutors, and according to his evidence Hughes first solicited him to rob his master on the 20th or 22nd of November, asking him if he could get him a few pounds of fents and he would keep it dark, and to bring them to him at any time, and they would be right. That accordingly the next day he took eight pounds of patchwork, which he had stolen from his masters, to Hughes, who gave him half-a-crown for it, the selling price being 7d. per lb. This patchwork was afterwards found in Hughes's cellar (his place of business), and he stated that he had got it from Hall.

That on the Monday following he was passing Hughes's place, who called him in and asked if he could get him any more of those fents; he said he could, and it was arranged between them that a person of the name of Lowe, who was called into the cellar, should go next day to the warehouse of Hall's masters, 100, Moseley-street, and bring the parcel he was there to get from Hall to Hughes.

Lowe, who did not appear to be aware of the nature of the transaction between Hall and Hughes, forgot his appointment.

Hall went the same afternoon to inquire why the man had not come; he was sent to Hughes's place, and said he had got drunk and forgot it, and it was then arranged between Hughes and Hall and Lowe, that Lowe should go to the warehouse of the prosecutors, 100, Moseley-street, next morning, the 30th November, at half-past eight, and there receive a parcel to be given to him by Hall, and bring it to Hughes, and Hughes directed him to bring the parcel to his cellar (which was his place of business, and was under a public-house), but if he was not in when he came with it, he was to take the parcel into that public-house and leave it there for him (Hughes) until he returned. On the morning of the 30th November, Hall opened the warehouse at a quarter past eight, and found Lowe there waiting for him, and about a quarter to nine Hall gave him a bundle of fents that belonged to his masters, and he went away with them.

A policeman on duty in the neighbourhood saw Lowe carrying this bundle on his shoulder, followed him and saw him take it into the public-house over Hughes's cellar, which was then shut, and on going into the kitchen of the public-house he saw the bundle lying on the kitchen-table there, and from the account given of it by Lowe he took it to the station. Another policeman took immediate possession of Hughes's cellar, and waited till he came in, and asked him if he had sent a man for any goods that morning; he replied, "I have sent a man for some fents to 100, Moseley-street." He was then taken into custody.

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The patchwork or fents found in Hughes's cellar, and which he said he had got from Hall, and the bundle of fents brought by Lowe from 100, Moseley-street, to the said public-house, were identified by the prosecutors as their property.

Dr. Wheeler appeared as counsel for Hughes, and cross-examined the witness, and addressed the jury on behalf of Hughes, contending that they ought utterly to disregard everything that Hall had said, and acquit his client.

I summed up the evidence, and told the jury that they alone were to decide on the credit to be given to the witnesses, but that if they believed Hall to the full extent of his evidence, Hughes was a guilty participator in both larcenies. That if they doubted about that, they would have to consider whether they were or were not satisfied that he received the property, knowing it to have been stolen. And with reference to the fact of receipt of the second parcel of goods which Lowe was sent for by Hughes, with directions in case he should be out when he came to leave it for him at the said public-house, and Lowe having done so, I told them that was as much a receipt by him as if it had been brought to him in his cellar and left there.

The jury retired at seven o'clock to consider their verdict, and I left the court. They some time afterwards gave a general verdict of guilty, which was so entered. They strongly recommended the prisoner to mercy.

The question for the opinion of the court is—

Whether, as the facts showed that Hughes, if guilty at all of the larceny, was guilty only as an accessory before the fact, and Hall the principal having been acquitted, I ought not to have told the jury that Hughes was entitled to his acquittal on the counts for larceny, and that they were to confine their attention to the count for receiving only; and if I ought so to have directed them, whether, on this general verdict, judgment can now be pronounced on the count for receiving.

Hughes was admitted to bail to appear and receive judgment when called upon.

ROBERT B. ARMSTRONG, Recorder of Manchester.

#### COPY OF INDICTMENT.

City of Manchester, in the county of Lancaster, to wit.—The jurors for our Lady the Queen upon their oath present, that William Hall and William Hughes, late of the city of Manchester, in the county of Lancaster, on the 22nd day of November, in the year of our Lord 1859, at the city aforesaid, and within the jurisdiction of this court, and within the space of six calendar months from the first to the last of the several acts of stealing charged in this indictment, ten pounds weight of cotton fents, of the property of William Henry Smith and another, then and there being found, feloniously did steal, take and carry away, against the form of the



statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Hall and William Hughes, on the 30th day of November in the year aforesaid, and within the jurisdiction of this court, and within the space of six calendar months from the first to the last of the several acts of stealing charged in this indictment, 18lbs. weight of cotton fents, of the property of the said William Henry Smith and another, then and there being found, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Hughes afterwards, to wit, on the same day and year aforesaid, at the city aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, the property aforesaid, before then feloniously stolen, taken and carried away, feloniously did receive and have, he the said William Hughes then and there well knowing the same to have been feloniously stolen, taken and carried away, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

William Hall, not guilty.

William Hughes, guilty.

Dr. *Wheeler* (*Hopwood* with him) for the prisoner.—First, the prisoner Hall having been acquitted of the larceny, and Hughes having been found guilty on evidence of being an accessory before the fact, it is contended that that conviction cannot be supported. The finding is inconsistent, for if Hall did not commit the larceny, how could Hughes be an accessory? And there was no evidence to support the charge against Hughes except as an accessory before the fact. If two persons are indicted for conspiracy, and one be acquitted, the other cannot be convicted. "The accessory shall not be constrained to answer to his indictment till the principal be tried (9 E. 4, 48 a); but if he will waive that benefit, and put himself upon his trial before the principal be tried, he may, and his acquittal or conviction upon that trial is good: (Stamf. P. C. lib. 1, c. 49 f, 46 b.) But it seems necessary in such a case to respite judgment till the principal be convicted and attaint; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him, but if he be acquitted of the accessory that acquittal is good, and he shall be discharged:" (1 Hale P. C. 623.) The 11 & 12 Vict. c. 46, s. 1, which enacts "that if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law or by statute, such person may be indicted, tried, convicted and punished in all respects as if he were a principal felon," simply alters the form of pleading only. The old law stands as before: "If A. be arrested, or in prison for

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felony, and B. rescues him, or the gaoler suffers him voluntarily to escape, though this be a distinct felony in B. the rescuer, and in the gaoler, for which they may be presently indicted, yet they shall not be arraigned or put to answer till A. be convicted and attainted by judgment:" (2 Hale P. C. 223.) And the same rule holds with regard to accessories generally.

HILL, J.—The preamble of 11 & 12 Vict. c. 46, is, "Whereas it is expedient that any accessory before the fact to felony should be liable to be indicted, tried, convicted and punished in all respects like the principal, as is now the case in treason and in all misdemeanors, be it enacted," &c. That to my mind is a strong indication that the Legislature intended to make the guilt of an accessory the same as that of a principal; and the enacting part seems to make them both principal felons.

*Wheeler.*—There is nothing in the statute, it is submitted, which makes the accessory liable, if the thief is acquitted of the charge. The words, "indicted, tried, convicted and punished," refer to the mode of procedure only.

WIGHTMAN, J.—If the accessory has been tried, convicted and sentenced before the principal is tried and acquitted, could he bring a writ of error? It might be that the sentence had expired before the trial and acquittal of the principal. I therefore think the enactment intended to make the accessory a principal.

*Wheeler.*—It is contended that the statute intended to make no further change with regard to accessories before the fact, than what the judges did of their own authority, with regard to accessories after the fact. As to the second point—the general verdict. The recorder charged the jury, that if they had any doubt as to Hughes being a participator in the larcenies, to consider the count for receiving, and to find their verdict as to one or other of the charges. The jury, however, returned a general verdict, which it is not possible to apply; for if Hall was not the thief, then Hughes could not be a receiver. (Statutes cited, 7 Geo. 4, c. 64, s. 9; 14 & 15 Vict. c. 100, s. 15.)

*Sowler*, for the prosecution, was not called upon.

ERLE, C.J.—We are all of opinion that the conviction was right, notwithstanding the points relied upon by the prisoner's counsel. This was an indictment against Hall and Hughes, in the first and second counts for larceny, and in the third against Hughes only, for feloniously receiving, and no evidence being offered against Hall, the jury were directed to acquit him. Hall was then called as a witness against Hughes, and the jury found Hughes guilty, on evidence of being an accessory before the fact. The question is, is that an inconsistency, and does it entitle Hughes to be acquitted? Now, we think that the 11 & 12 Vict. c. 46, s. 1, has made the crime of being an accessory before the fact a substantive felony, and that the old law making the conviction of the principal felon a condition precedent to the conviction of the accessory before the fact, is taken away by that clause. The first question is, whether that enactment meant only that the indictment

should be cleared of technical matters, or created a substantial felony. Upon that we are of opinion that the statute made it a substantive absolute felony, the being an accessory before the fact. Then, where the accessory before the fact is first convicted and sentenced, is there any proceeding by error or otherwise to discharge him? We are of opinion that there is not. It is said that it might be that his sentence would expire before the trial of the principal, who might be acquitted; but we are of opinion that in that case no wrong would be done. Whether the principal be tried before or at some time after the accessory before the fact, still there may be guilt in the accessory. We must look beyond technical considerations, and see whether there was a larceny. There are many cases in which an acquittal takes place, and yet the actual guilt is clear. Therefore we are of opinion that the statute did intend to create the responsibility of an accessory before the fact a substantive felony. With respect to the second point, as to the general verdict, the learned recorder having charged the jury, left the court, and the jury some time afterwards returned a general verdict of guilty, which was entered upon both charges. It is said that that is an inconsistency. Looking at the evidence, there can be no doubt of the substantial guilt of the prisoner, and the court will make every intendment to support the conviction consistently with the evidence. In our judgments there is no inconsistency in being an accessory before the fact and a receiver afterwards, and we think that the jury might reasonably and logically convict the prisoner of both offences.

The rest of the court concurring.

*Conviction affirmed*

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## COURT OF CRIMINAL APPEAL.

*January 28, 1860.*

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ., MARTIN and CHANNELL, BB.)

REG. v. RACHEL WARDROPER. (a)

*Husband and wife—Charge of joint receiving—Presumption of marital coercion.*

*A., B. and B.'s wife were indicted jointly for burglary and receiving; the jury found A. guilty of burglary, and B. and his wife of receiving. Part of the property was found in B.'s house, and from that fact, and others, the jury were warranted in finding B. guilty of receiving. To connect the wife with the matter, it was proved that some time after the burglary the wife was seen dealing with part of the stolen things, when she made a statement importing a knowledge that the things had been stolen, and that they were to be made away with. The judge at the trial declined to leave it to the jury to find whether B.'s wife received the things from her husband or in his absence, and the jury found B.'s wife guilty of receiving:*

*Held, that the questions were proper for the consideration of the jury, and the conviction could not be supported.*

CASE reserved by Martin, B.

The prisoner was indicted at the last Newcastle Assizes, together with her husband and a man named Prishous, for burglary and receiving.

The jury found Prishous guilty of housebreaking, and the prisoner and her husband of receiving.

The housebreaking was the breaking into a jeweller's shop at Newcastle, and committing a very extensive robbery of the stock.

The property stolen consisted, amongst a great variety of other things, of rings, watch-keys, brooches, stones for being set in brooches, and foreign coins.

There was evidence of part of the stolen property being found in the house where the prisoner and her husband lived together, and of other circumstances which I think warranted the jury in

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

finding the husband guilty of receiving, but except what follows there was no evidence which peculiarly affected the prisoner.

A young woman deposed that, some time after the burglary, the prisoner, in the absence of her husband, produced to her a quantity of watch-keys, brooches, stones for being set in brooches, and coins, and said they were to be destroyed; that she said she had been down the street changing some foreign money, and thought she was going to be taken up for it; and that she asked her (the young woman) to come down if she was taken and collect the largest coins, and say a foreign captain had given them to her (she being a prostitute).

I think there was evidence that all those articles were part of the stolen property.

It was also proved that at the time of the prisoner's apprehension, she had upon her fingers some of the stolen rings.

At the close of the case for the prosecution it was submitted by counsel for the prisoners, that as against Rachel Wardroper there was no evidence that she received the articles, either in the absence of the husband, or from any other person than him, and that if there was evidence for the jury, the question would be whether she received them from him, and if not from him, whether she received them in his absence.

I ruled that there was evidence for the jury, and did not leave either of those questions to them.

The jury convicted the prisoner, and I thought her conviction right; but after the jury had found their verdict I was asked to inquire whether the jury found that the prisoner received the articles in question from her husband, or in his absence. I declined to do so.

I request the opinion of the Court of Criminal Appeal whether the prisoner was rightly convicted, assuming that all the other evidence as to the receiving was of such a character as to entitle her to be acquitted, by reason of her relation of wife to the other convicted receiver.

If they think she was not rightly convicted, they will please direct the prisoner to be discharged.

The following cases were relied on at the trial on the part of the prisoner:—

*Archer's case* (1 Moo. C. C. 143), where husband and wife were convicted on a joint indictment for receiving stolen goods, it was held that the conviction of the wife was bad, it not having been left to the jury to say whether she received the goods in the absence of her husband.

*Reg. v. Brooks* (6 Cox Crim. Cas. 148), a wife received from her husband goods which he had stolen, she knowing at the time they were stolen; and she endeavoured afterwards to prevent their discovery. The judge told the jury that, as her husband had delivered the stolen articles to the prisoner, the law presumed that she acted under his control in receiving them, but that this presumption might be rebutted. If, therefore, in

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considering the evidence they were perfectly satisfied that at the time when she received any of the articles she knew that they were stolen, and in receiving them acted voluntarily and with a fraudulent intention, she might be found guilty. The jury having found her guilty, the Court of Criminal Appeal quashed the conviction.

ERLE, C.J.—The court thinks that there were sufficient circumstances in the case to authorise the prisoner's counsel to request the learned judge to put the question he desired to the jury, so that the point should have been left to the jury for their determination. It was perfectly consistent with the facts proved that the goods might have been taken to and received by the husband at his own house, and so come into the possession of the wife through her husband, in a manner that did not render her liable to be convicted. The goods clearly were taken to the husband's house. If the question reserved had been left to the jury, and they had convicted the wife, the court would have supported that conviction, but as it had not been so left, the court thought it more satisfactory that her conviction should be quashed.

WILLIAMS, J.—I also think that upon the peculiar circumstances of this case the prisoner ought to be discharged. I am not prepared to say that the liability of a wife differs from that of any other person, unless there is some evidence to show that she was acting under his control.

MARTIN, B.—On consideration, I think that I ought to have dealt differently with this case at the trial, and called the attention of the jury with greater accuracy to the law on the subject. I am not satisfied that I dealt as I ought to have done with the case.

WIGHTMAN, J.—The charge was of a joint receiving.

CHANNELL, B.—I am of opinion that the prisoner was entitled to have the questions suggested to the judge by her counsel, left to the jury. I attach great importance to the fact of the charge being a joint receiving by her and her husband.

*Conviction quashed.*

## Ireland.

## COURT OF EXCHEQUER CHAMBER.

SITTINGS IN BANCO AFTER TRINITY TERM.

CROWN SIDE.

June 17, 1859.

(Before HAYES, J.)

REG. v. EDWARD GONNE BELL. (a)

*Certiorari—Coroner's inquisition—Venue, change of—Jurors—Trial, impartial—Manslaughter.*

*Where it primâ facie appears to this court that a fair and impartial trial cannot be had in a particular place, and such is not displaced by a strong case in answer thereto, the court will grant a certiorari to remove the proceedings into the Queen's Bench to enable an application to be made to have such case tried in some other jurisdiction.*

THIS case came before the court upon a motion to make absolute, notwithstanding the cause shown, a conditional order of the 7th of June, 1859, whereby it was ordered that a writ of *certiorari* should issue directed to the Clerk of the Crown for the County of the City of Limerick, to remove into this court all and singular inquisitions and depositions taken or made before the coroner in the said County of the City, on or about the 25th day of May, 1859, for the purpose of having the venue changed from the County of the City of Limerick to the County of Limerick, on the grounds that the parties charged with manslaughter under the said inquisition could not have a fair and impartial trial in the County of the City of Limerick, unless cause should be shown within three days after the service of the order upon the solicitor for the next-of-kin of the deceased at his registered town lodgings, and upon the Crown Solicitor. It appeared from the following affidavits, which had been filed to ground the motion for the conditional order, from the affidavit of Edward Gonne Belle, R.M.,

(a) We are indebted to *The Irish Jurist* for a report of this case.

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that, at an inquest held at Limerick before the coroner, on view of the bodies of three persons, a verdict of manslaughter was, on the 25th of May, 1859, returned by the jury against Edward Gonne Bell and a party of police who were under his charge upon the evening of the 4th of May, 1859, at Broad Street, in the City of Limerick, during the election for the said City of Limerick, when very angry and bitter feelings were excited; that very many of the persons who would be likely to serve as jurors in the said city took a very warm interest in the said election on behalf of the popular candidate, and exerted themselves very much in bringing up voters; that he truly believed that it would be impossible to have a jury empannelled for his trial and said party of police who would enter upon the trial and listen to the defence with unbiassed and unprejudiced minds; that the circumstances connected with the unhappy occurrence have been repeatedly discussed among all persons in the said city; the deaths of said men and the firing of said police were referred to in placards posted throughout said city, in which it was stated that the people were shot down by the Orange underlings of the Derby Government; that the conduct of said Bell and the police has been canvassed and commented on by several of the local newspapers, which have been widely circulated in said City, and in several numbers thereof said occurrence has been designated in the strongest language as "an awful effusion of innocent blood," "murderous outrage," "Broad Street slaughter," "hideous and revolting case," &c.; that a committee has been appointed to collect subscriptions for the families of the sufferers, and about forty gentlemen were appointed members of said committee, among whom, are many who are likely to form the petty jury panel at the ensuing assizes. There were also affidavits from the County Inspector of Police, and from the said Edward Gonne Bell's solicitor, strongly corroborative of the above facts. There were only two affidavits filed as cause—one by the town agent of Joseph Murphy, who was the solicitor for the next of kin of the deceased; and the other by fifteen of the persons who composed the coroner's jury on the occasion of the said inquest. The former affidavit stated that the verdict on the inquisition was given on the 25th of May, 1859, and no motion for the *certiorari* was made until the 6th of June, 1859; and that the said solicitor for the next of kin was not present during the entire of the proceedings before the coroner, and was not aware of all the facts stated in the affidavits filed to ground the motion for the conditional order; and that the said solicitor was then absent from town, and that within the three days allowed for showing cause it was wholly impossible to have the necessary affidavits filed to displace the many erroneous statements which he was informed were contained in the said affidavits. The second affidavit, filed as cause by the fifteen jurors, stated they were astonished at hearing that it had been alleged that they had been intimidated into finding the said verdict; no intimidation was practised and they would not submit to any; that they were summoned by the police



in the usual way; that they found the said verdict on the evidence laid before them, totally uninfluenced by any other consideration than that of honestly discharging an invidious public duty.

*James Murphy (J. Clarke, Q.C., with him)* for Edward Gonno Bell, submitted that under the circumstances the conditional order for a *certiorari* should be made absolute.

*Andrew Vance*, on behalf of the Crown, appeared to say that it seemed almost a matter of right the *certiorari* should issue.

*O'Hagan, Q.C. (Charles Barry with him)* contra, for the next of kin of the deceased.

*Clarke, Q.C.*, objects that on a motion of this nature, counsel on behalf of the next of kin should not be heard, as the matter should rest between the party charged and the Crown.

*James Murphy.*—In the *Six Mile Bridge Case* it was held that the only persons who could be heard on a motion such as this, was the Crown and the prisoners.

*Charles Barry.*—I was in that case for the next of kin and was heard, and in the case of *The Queen v. Palmer* (5 E. and B. 1024), counsel appeared for the next of kin and were heard.

*Clarke, Q.C.*—There is a marked distinction between cases of this sort in England and in Ireland, for in the former these cases are taken up by private prosecutors, but in the latter the prosecutions are taken up and prosecuted by the Crown. [HAYES, J.—There is some difference between a coroner's inquisition and a case which has undergone a magisterial investigation; for in the former the party is not bound to prosecute at all, but in the latter the witnesses are generally bound over by the magistrates to prosecute. I am inclined, as the learned judge who made the conditional order made it a part of the same that the solicitor for the next of kin should be served, and as the next of kin now appeared by his counsel, and as this is a matter having reference to a coroner's inquisition, and as I have heard all that one side has to say in this matter, to hear what those on behalf of the next of kin have to say why I should not make absolute this conditional order for a *certiorari*].

*O'Hagan, Q.C.*—Three days being only allowed for showing cause against the conditional order, we could not procure affidavits in reply within that time. The object of this motion is clearly to postpone this trial from the next to the Spring Assizes, 1860. The verdict of the coroner's jury was given on the 25th May, 1859; the conditional order was not applied for until the 6th of June. If now that order be made absolute, the inquisition will be returned, and no motion for a change of venue can be made until after plea pleaded in this court: (*Reg. v. Forbes*, 2 Dowlings's P. C. 440). The *laches* of the parties is enough here to have this motion refused. The application to have it tried by a jury from the county can be made to the judge at the trial at Limerick.

*C. Barry.*—We are here on an *ex parte* motion, for it was

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impossible within the time allowed we could have any affidavits in reply.

*Clarke, Q. C.*, in reply.—Where a *prima facie* case, such as here, is made, that it would be unlikely that a fair trial would be had in any particular place, it is almost a matter of course to grant the *certiorari* to remove the proceedings, unless a strong case be made out on the other side. In this case there has not been an affidavit made even by the attorney of the next of kin, stating even his belief that a fair trial could be had in the City of Limerick: (*Rex v. Holden*, 5 B. & Adol. 347).

HAYES, J.—This case comes to a very narrow point, for I have nothing now to do with many of the discussions which have been raised during the progress of this motion. I have only now to deal with the question whether a *certiorari* should issue in this case or not, and this case I will deal with merely on legal grounds, and I will deal with the materials, such as they are, which I have before me. It has been said that the shortness of the time which was allowed for showing cause did not allow of affidavits being filed in answer. If that were so it would have been open to the parties to have come here with an application to extend the time for filing affidavits as cause. This was not done, and two affidavits only were filed; so I must now deal with the case as I find it, bearing in mind that this is a very serious charge, and a case occurring within a very limited jurisdiction, and bearing in mind the circumstances of this case, I do not see any reason why I should not grant this motion; and without giving any opinion on any of the extraneous matters which have been discussed during the progress of this motion, I will only say I think this *certiorari* should go.

*Rule accordingly.*

[A similar rule was made subsequently to bring up any indictments which may be found against Mr. Bell or the police at the ensuing assizes.—REP.]

## Ireland.

## COURT OF QUEEN'S BENCH.

*November 30, 1859.*(Before HAYES, J., at *Nisi Prius*.)

LESTER v. FEGAN. (a)

*Special jury—Old practice—Political case.**An action for penalties under the Corrupt Practices Prevention Act. Held, to be a case in which an application for a special jury under the late practice ought to be granted.*

THIS was an action brought to recover the amount of certain penalties under the Corrupt Practices Prevention Act (17 & 18 Vict. c. 102) for alleged bribery. The present was an application on the part of the defendant, under the 112th section of the Common Law Procedure Act, for an order that the special jury might be struck according to the late practice. The application was made on Thursday the 29th before the Chief Justice, who directed it to stand until the following day, in order that the opposite party might have notice of it. The motion was grounded on an affidavit by the defendant in the following terms:—"The present action has been brought against deponent for the recovery of penalties, on the ground of bribery, alleged to have taken place at the election for the return of a member of Parliament for the borough of Newry, in the month of May, 1859. That deponent is a land agent, and ever since the year 1826 has been resident at Newry; and at all the several elections for the said borough which have taken place from that time to the present, deponent has used his exertions and given his assistance, as his local knowledge and position in the county enabled him, in favour of the gentlemen who, from time to time, canvassed the borough on the Conservative side in politics. That the plaintiff is a person in humble position and in poor circumstances, and deponent verily believes he is put forward as the party in whose name the action is brought, at the instance and on behalf of certain persons who are interested in favour of the Liberal party of the electors of the said borough, and that, in fact, they have instituted the present proceedings with the object merely of promoting, through the verdict which

We are indebted to *The Irish Jurist* for a report of this case.

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they now seek, certain proceedings which are now in progress at the instance of the Liberal party, with the view of petitioning the House of Commons, and of unseating the present Conservative member for the said borough, on whose behalf at the late election, deponent, consistently with his previous uniform course in that behalf, as aforesaid, had used his best exertions, which deponent did honestly and in good faith, without resorting to or committing any such acts as are intended to be prevented by the said statute. That from the present state of the ordinary special jury panel for the approaching *Nisi Prius* trials, and on close inspection of the names of the gentlemen appearing thereon as special jurors, deponent is apprehensive that, from the preponderance in numbers of those known in the city of Dublin as belonging to a particular side in politics, a fair trial of the action cannot be obtained before a special jury in the ordinary way; and deponent believes that the result will be much more satisfactory, and the jury much more unexceptionable on both sides, if the jury should be taken, according to the late practice, from a special jury list, giving each party an opportunity of striking off a certain number of names."

*Macdonogh, Q.C.* (*Hugh Law* with him), for the application.—The party opposing this motion have not thought fit to reply to the affidavit of the defendant. The defendant only seeks what should not have been objected to—a fair and impartial trial. Under the circumstances disclosed this application is consistent with justice and ought to be granted. In some cases similar applications have been granted *ex parte*. In the case of *Dowling v. Browne*, which was one of the *Sadleir* cases, a similar application was granted by the court. They also referred to the cases of *Barron v. West of England Insurance Company* (3 Ir. C. Law Rep. 112; 6 Ir. Jur. 115), *Dixon v. Denroche* (3 Ir. C. Law Rep. 241; 6 Ir. Jur. 313).

HAYES.—Is it possible at the present period of the sittings to comply with the motion, without much inconvenience to the public or the parties?

*Macdonogh*.—The case is last in the list, and it is therefore quite possible.

*O'Hagan, Serjt.*, and *D. C. Heron*, contra.—The course with respect to the selection of juries has been changed by the Common Law Procedure Act, which casts upon the sheriff the duty of empannelling the jury to try actions such as the present. The court is bound to presume that the sheriff has done his duty, until the contrary be shown. The plaintiff is now ready for trial and in attendance with his witnesses, and this motion, if granted, will delay the trial. The single ground relied on—namely, the preponderance of persons of a particular political opinion appearing on the ordinary special jury panel, is no reason why this motion ought to be granted. The decision of this court in *Smyly v. Hughes* (7 Ir. Jur. 139), rules the present motion. That was an action by a Protestant clergyman against a Roman Catholic

priest, for an assault, and involved matters of religion; the first jury disagreed, and the plaintiff applied that a special jury might be struck under the former practice; the court unanimously refused the application.

HAYES, J.--It is not necessary for the decision of this case that the most remote imputation should be cast on the impartiality of the sheriff, or the intelligence of the jury which he has returned. I decide the present case upon the simple, plain, intelligible ground, that I think a political case is an exceptional one. I do not think a religious case is exceptional. By a religious case I mean one in which the plaintiff is of a different religion from the defendant. I threw out already what would guide my decision—namely, the nature of the case; and I think that principle leads me to a safe and sound conclusion, and does not in the slightest degree conflict with the case of *Smyly v. Hughes*, which was a simple case of assault. It is very important that the administration of justice should not only be free from imputation, but should also be, as far as possible, satisfactory to the parties concerned; and when I find that possibly the sheriff, whose duty it is to return on the special panel forty-eight names of persons of approved intelligence, in the exercise of his sound discretion may possibly have returned a preponderance of one religion or the other—I care not which—I should think it a mischievous state of things if the sheriff were on every occasion to be balancing between religions in this unfortunate country, and to have to return twenty-four of one religion, simply because he had returned twenty-four of another. If religion is not to be looked to, but if probity and intelligence are to be guides to the sheriff in the selection of his panel, it is not to be wondered at that in every case there should be a preponderance of either one religion or the other; and therefore it is that I think this motion is not to be decided by imputations upon the sheriff. I decide it altogether by the nature of the case which is to be tried; and I think, that if we cannot attain perfect impartiality in this way, at all events we shall give the parties what the law has insured may be given in certain proper cases—namely, the selection of their own tribunal. Now a political case is just the case in which that may be done, I would almost say at the call of either party; and, therefore, I say this motion ought to be granted. I presume that the Chief Justice would not have directed this motion to be made to-day, if he considered an objection on the score of delay to be insuperable. He will, of course, take care that a day shall be selected for the trial which will meet the exigencies of the parties on both sides. With respect to the witnesses being in town, I must say that, if they shall be detained in consequence of the granting of this application, it is but reasonable that the extra expenses shall be paid by the defendant, and I make that a part of the rule.

*Order accordingly.*

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## CIRCUIT CASES.

DUNDALK LENT ASSIZES, 1859.

RECORD COURT.

[*Coram*—PIGOT, C.B.]

IN RE THE DUNDALK, CARRICKMACROSS, AND CASTLEBLANEY  
TURNPIKE TRUSTS, AND THE TURNPIKES (IRELAND)  
ABOLITION ACT. (a)

*Presentment—Grand Jury Acts—Turnpike Act—Postponement of  
Traverse*—20 & 21 Vict. c. 16, s. 18; 6 & 7 Wm. 4, c. 116, ss.  
133, 134.

*Held, that the court has jurisdiction, under the 6 & 7 Wm. 4, c. 116, s.  
134, and 20 & 21 Vict. c. 16, s. 18, to respite to a subsequent assizes  
the hearing of a traverse of an award by the Turnpikes Abolition  
Commissioner.*

The Act 11 Geo. 4, and 1 Wm. 4, intituled, *An Act for Repairing and Maintaining the Roads from the Town of Dundalk, Co. Louth, to the Towns of Carrickmacross and Castleblaney, in the County of Monaghan,* empowered the trustees appointed in pursuance thereof, *inter alia*, to borrow and take up at interest such sum or sums of money as they should consider necessary for the purposes of the said act, not exceeding in the whole the sum of 4,000*l.*; and the said act further provided that it should continue in force for thirty-one years from the passing thereof in the year 1830; and, in pursuance of the powers then enabling, the trustees, from time to time, borrowed, from divers persons, sums amounting to about 2550*l.*, which remained, at the present date, a charge upon the trust. By the Turnpikes Abolition Act (Ireland), 1857, certain turnpike acts, including the one hereinbefore mentioned, were repealed from and after 5th April, 1858, and the trustees thereby appointed, and the collection of tolls on all the roads therein mentioned, ceased. In order to carry the provisions of the said act into operation, a Turnpike Abolition Commissioner (E. D. Clements, Esq.), was appointed, and was directed by said act, amongst

(a) We are indebted to *The Irish Jurist* for a report of this case.

other duties, to inquire into the revenue and debts, if any, of each of the several turnpike trusts so abolished, and the amount of all mortgages, debentures, &c., charged thereon. The said commissioner, in pursuance of said act, duly held an investigation at the court-house, Dundalk, and having heard such claims as were brought before him, together with evidence tendered, as well on behalf of the several claimants as for the cess-payers interested therein, made his several awards, assigning various sums to the different claimants (including 654*l.* to A. Shekleton, and 227*l.* to Lord Blaney), with interest thereon at the rate of 4*l.* per cent. per annum; and each of said sums were to be charged, by way of mortgage, apportioned upon the several counties of Louth, Monaghan, and Armagh, according to a certain schedule annexed to his award, and was to be raised by grand jury presentment to be levied off the several baronies in such proportions as are in the said schedule specifically set forth. Several of the claimants, including Mr. Shekleton and Lord Blaney, being dissatisfied with the commissioner's award, entered (under the provisions of the 18th section of the Turnpikes Abolition Act (Ireland), 1857), several traverses for the then next general Lent Assizes, to be held at Dundalk in 1859, for the purpose of enforcing their claims of larger sums than had been awarded to them as aforesaid. Notice of traverse was, it appears, duly served upon the commissioner, pursuant to the 18th section of the Turnpikes Abolition Act. A jury having been empannelled at the Lent Assizes, the trial of the traverses came on before Fitzgerald, B., in the Crown Court, but without result, as the jury, not being able to agree, were discharged without a finding. The grand jury did not appear at the trial, but the traversers were represented by counsel. The judge in the Civil Court being disengaged, the traversers applied to have another traverse jury empannelled to try the traverses a second time.

*R. Andrews, Q.C.*, appeared on behalf of the grand jury of the County of Louth, and sought to have the trial of the several traverses respite until the next assizes, on the ground that his clients were not prepared with their evidence to contest the claims, and because it was impossible to obtain at the present assizes the attendance of the commissioner, whose evidence was most material in the case, and whose presence they had, ineffectually, endeavoured to secure.

*Joy, Q.C. (A. S. Crawford with him)*, contra.—This course would be highly inconvenient to the traversers, whose witnesses are all in attendance, and considerable expense incurred. This is the proper assizes whereat to try the traverses, and the court has no power to respite the trial of them to a future assizes.

*PIGOT, C.B.*—I have conferred with Baron Fitzgerald on this case, and on a consideration of the 18th section of the 20 & 21 Vict. c. 16, and of the provisions of the Grand Jury Act, to which that section refers, we are both very clearly of opinion that the court has jurisdiction to respite this traverse to the next assizes.

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DUNDALK, &c.,  
TURNPIKE  
TRUSTS ABOLITION ACT.  
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Grand jury.

IN RE  
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TURNPIKE  
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TION ACT.

1859.

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Grand jury.

The 18th section of the 20 & 21 Vict. provides that "it shall be lawful for any creditor of any turnpike trust abolished by that act, who shall be dissatisfied with the award of the commissioner, at the assizes for the county, &c., held next after the day he shall have received notice in writing from the clerk or other officer of such trust, of the particulars of such award, or where said assizes are holden within less than twenty-one days after such notice, then at the next subsequent assizes, upon giving ten days' notice in writing previous to such assizes to the commissioner of the amount intended to be claimed, to have a traverse for damages entered in the Crown book in respect of such claim: and thereupon such traverse shall be tried in like manner, and like proceedings shall be had in respect thereof, and such traverse shall be subject to the like provisions, as far as the same can be applied, as in the case of traverses entered for damages under the Acts for Consolidating and Amending the Laws relating to Presentments of Public Monies by Grand Juries in Ireland." The provision for trying traverses for damages under the Grand Jury Act referred to in this section, is contained in the 134th section of the 6 & 7 Will. 4, c. 116. That section provides "that it shall be lawful for any occupier or owner of the ground through which any new road is to be made, or into which any old road is to be widened, to traverse the presentment for the same for damages at such assizes as aforesaid" [that is, the assizes at which, as mentioned in the preceding (133rd) section, the presentment was made], "having given like notice to the chairman of the presentment sessions, and to the secretary of the grand jury, previous to the commencement of such assizes, of the amount of the damages intended to be claimed, which traverse or traverses shall be tried then or at the ensuing assizes, upon the entry in the Crown book of the presentment and the traverse, without making up any record." In each of these sections (the 18th of the 20 & 21 Vict. c. 16, and the 134th of the 6 & 7 Will. 4, c. 116), two distinct enactments are made, the one prescribing when and how the traverse shall be made or entered, the other prescribing where and how the traverse shall be tried. The 134th section of the Grand Jury Act directs that the party "shall traverse," and it directs such traverse to be entered "at the assizes at which the presentment shall be made, provided the traverser shall have given certain preliminary notices. The 18th section of the 20 & 21 Vict. c. 16, directs, in effect, that the traverse shall be "entered at the assizes which shall be held next after the expiration of twenty-one days from the receipt by the claimant of the written notice of the award, provided he shall have given the preliminary ten days' notice required by that act." The 18th section of the 20 & 21 Vict. c. 16, then provides that "thereupon," that is, upon the entry of the traverse in due time, "such traverse shall be tried in like manner, and like proceedings shall be had in respect thereof, and such traverse shall be subject to the like proceedings as far as the same can be applied, as in the case of traverses entered for



damages" under the Grand Jury Acts. But the 134th section of the Grand Jury Act 6 & 7 Will 4, c. 116, provides that the traverse for damages shall be tried at the assizes at which it is entered, *or* at the ensuing assizes. And the result of that section and of the 18th section of the 20 & 21 Vict., which refers to and by reference incorporates this provision, is, that the traverse of the award, entered at the proper assizes for entering such traverse, "shall be tried then *or* at the ensuing assizes." My brother Fitzgerald and I are both, therefore, clearly of opinion that the court has jurisdiction to postpone to the next assizes the trial of this traverse which was entered at the present assizes. The fact of the case having been already submitted to a jury, who disagreed and were discharged in consequence of their inability to agree, is wholly immaterial in reference to the question of jurisdiction to try this traverse at the next assizes. The traverse is untried, and the case is to be now dealt with by trial or by postponement, just as if their had been no previous abortive attempt.

The order of the court was in the following terms:—"On the application of Mr. Booth, solicitor on part of Grand Jury, the traversers objecting, and on reading his affidavit filed this day, and it appearing to the court that the notices of traverse were duly served on Edward Clements, Esq., the Turnpikes Abolition Commissioner, before the hearing of this traverse—let the hearing of this traverse be respited until next assizes. Mr. Booth, on behalf of the Grand Jury and persons objecting to the traverse, undertaking and consenting to admit at any future trial of this traverse, that the books now produced, and signed by the Clerk of the Crown, are the books of the Dundalk and Castleblaney Turnpike Trust. Mr. Booth, on part of Grand Jury, further consenting and undertaking to abide such order as the court at next assizes may make as to the traverser's costs at this present assizes."

IN RE  
DUNDALK, &c.,  
TURNPIKE  
TRUSTS ABOLI-  
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## COURT OF CRIMINAL APPEAL.

*April 28, 1860.*(Before POLLOCK, C.B., CHANNELL, B., BYLES, BLACKBURN,  
and KEATING, J.J.)

REG. v. CHARLES HALLIDAY. (a)

*Evidence—Husband and Wife—Wife implicated but not charged—  
Admissibility of Husband—Inconsistent findings.**The prisoner was indicted for obtaining money from the trustees of a savings bank, by falsely pretending that a document produced by the wife of D. had been filled up by D.'s authority; and in another count for conspiring with the wife of D. to cheat the Bank. D's wife presented the document, which had been fraudulently filled up at the instance of the prisoner, and obtained the money, and afterwards eloped with the prisoner. D's evidence was necessary to show that he had given no authority, but it was objected to on the ground that it implicated his wife:**Held, that D's evidence was admissible, as the wife was not charged upon the indictment.**Held, also that the finding of the prisoner guilty on the first count for false pretences, was not inconsistent with his acquittal on the count for conspiracy.*

CASE reserved for the opinion of this Court by Byles, J.:

The prisoner was indicted for obtaining from the Trustees of the Swansea Savings Bank a sum of 60*l.*, by falsely pretending that a certain document produced to the bank by Eliza Thomas, the wife of Daniel Thomas, had been filled up by the authority of D. Thomas, the depositor, and was a genuine document.

There was a second count founded on another false pretence, by which the prisoner was alleged to have obtained by another document, produced by the said E. Thomas, a further sum of money.

There was a third count for a conspiracy between the prisoner and E. Thomas to cheat the savings bank.

It appeared that an authority to receive the money had been filled up by another witness at the instance of the prisoner; that E. Thomas, the wife of the depositor, had presented it and obtained the money; and that the prisoner had afterwards eloped with E. Thomas. On the apprehension of the prisoner a large sum of money was found in his possession.

The evidence of D. Thomas, the depositor, was essential to the prosecution, in order to show that he had given no authority to fill up the document, or to withdraw the deposit.

It was objected, on behalf of the prisoner, that, although the wife of D. Thomas was not included in the charge, yet he was not an admissible witness to prove her guilty of a conspiracy, nor even to prove the counts for false pretences: (see *Reg. v. Gleed*, 2 Russell on Crimes, 983.) (b)

I thought his evidence admissible on all the counts.

In deference, however, of the high authority of Littledale and Taunton, JJ., I reserved the point and suggested that the counsel for the prosecution should consent to a verdict of acquittal on the last count.

The counsel for the prisoner then objected that an acquittal on the last count was inconsistent with a verdict of guilty on the first count.

The Jury, however, found the prisoner guilty on the first count, and not guilty on the second and third counts.

I reserved these questions:—First, whether the husband's evidence was properly received in proof of the first count; secondly, whether there is any necessary inconsistency in the finding on the first and third counts.

The prisoner's sentence was deferred, but the prisoner remains in custody.

No counsel appeared either on the part of the prosecution, or the prisoner.

The judges retired to consider the case, and on their return into court,

POLLOCK, C.B., said:—The question is, whether the evidence

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(b) The following is the case of *R. v. Gleed*, alluded to:—But where on an indictment for stealing wheat, Eliza Ellis was called on the part of the crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton, J., doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband, by causing a charge to be made against him. The cases of *Reg. v. All Saints, Worcester* (6 M. & S. 194), and *Reg. v. Bathwick* (2 B. & Ad. 639), were then cited, Taunton, J. "I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale. In *Reg. v. All Saints, Worcester*, at the time when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately." Having consulted Mr. Justice Littledale, the learned judge added: "We both agree in opinion that the witness is incompetent. We think *Reg. v. All Saints, Worcester*, very distinguishable. There at the time when the wife was examined there was nothing in her evidence to convict her husband. Here the evidence would directly charge the husband with being a principal, and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received.

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of the husband was admissible, his evidence tending to show that his wife was acting unlawfully and criminally. On this indictment the wife was not charged at all, but she was involved in the conspiracy charged in the third count. Though that is so, it does not prevent the husband's evidence from being admissible. We are also of opinion that the acquittal of the prisoner on the third count, does not necessarily involve any inconsistency with the conviction on the first count.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*April 28, 1860.*

(Before POLLOCK, C.B., CHANNELL, B., BYLES, BLACKBURN,  
and KEATING, JJ.)

REG. v. JOHN DAUBENEY HIND.(a)

*Evidence—Dying declaration—Admissibility.*

*Upon an indictment for feloniously using certain instruments upon the person of a woman, who afterwards died, with intent to procure a miscarriage, the dying declaration of the woman is inadmissible.*

*The rule laid down in Mead's case (2 Barn. & Cres. 608), "that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration," recognised and adopted.*

CASE reserved by Keating, J., for the opinion of this Court.

John Daubeney Hind was tried before me, at the last assizes for the county of Gloucester, and convicted upon an indictment charging him with feloniously and unlawfully using certain instruments upon the person of one Mary Woolford, deceased, with intent to procure the miscarriage of the said Mary Woolford.

On the trial, a dying declaration of the said Mary Woolford was tendered in evidence on the part of the prosecution, and objected to on the part of the prisoner, upon the ground that the death of Mary Woolford was not the subject of the inquiry.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

I received the evidence, but reserved the question as to its admissibility, and respite the execution of the sentence until the Court of Criminal Appeal should pronounce its decision upon the point: (see *R. v. Baker*, 2 M. & Rob. 53.)

If the Court should be of opinion that the evidence was not admissible, then the judgment is to be reversed, inasmuch as without the evidence of the dying declaration of Mary Woolford the prisoner could not have been convicted.

If the Court should think the evidence admissible, then the judgment is to stand.

No counsel appeared for the prisoner.

*Carrington*, for the prosecution.—The only question is, as to the admissibility of a dying declaration upon a charge of using instruments upon the person of a woman, to procure a miscarriage. On the part of the prosecution it is submitted that such declarations are admissible in all cases where personal injury has been sustained. There are, however, decisions to the contrary. In *Rex v. Hutchinson* (2 Barn. & Cres. 608, n.), where the prisoner was indicted for administering savin to a pregnant woman with intent to procure abortion, evidence of her dying declaration was rejected (Bayley, J.), because the woman's death was not the subject of inquiry. In *Rex v. Baker* (2 Moo. & Rob. 53), where the prisoner was indicted for the murder of A., by eating poisoned cake, Coltman, J., after consulting Parke, B., admitted the dying declarations of another party who also died in consequence of eating some of the cake, but whose death was not the subject of the indictment. *McGregor's* case in the Court of Session, Scotland, 16 State Trials, 29, in the notes to the case of *Rex v. Tranter*, was also cited.(b)

*POLLOCK*, C.B.—In this case we are all of opinion that the dying declaration of the woman was improperly received in evidence. The rule we are disposed to adhere to, is to be found laid down in *Rex v. Mead* (2 Barn. & Cres. 608). There Abbott, C.J., said, "The general rule is, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of

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(b) The case is to be found in a note, and appears to be extracted from Hume's Commentaries respecting Trial for Crimes. The following is the passage:—"Although from their nature cases of murder are the most frequent, they are not, however, the only cases in which this sort of evidence may be employed, as appears from what passed in the trial of James Macgregor, Aug. 3, 1752, for the abduction and forcible marrying of Jean Key. After being recovered out of the panel's hands and placed with a relation of her own, that unfortunate young woman had, on the 20th of May, of her own accord, gone into the presence of two of the judges (the Lord Justice Clerk and Lord Drummorie) and had privately related to them the story of her sufferings, which was duly taken down in writing, and she had afterwards, in presence of the Court, confirmed and publicly adhered to this declaration. But at this time she was in an infirm and languishing condition in consequence of the grievous outrages which she had suffered, and she died before the libel was raised against the author of her distresses. To supply, therefore, as far as might be, this material defect, the prosecutor libelled on these declarations of hers as meaning to produce them by way of evidence at the trial. Accordingly, after hearing counsel, the Court allowed them to be used as circumstances of presumption against the panel, and they were again produced August 6 and December 27, 1753, in the trial of Robert Macgregor, the associate of James, in this atrocious enterprise."

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the dying declaration." Speaking for myself, I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of England, which I think ought not to be extended.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*April 28, 1860.*

(Before POLLOCK, C.B., CHANNELL, B., BYLES, BLACKBURN, and KEATING, JJ.)

REG. v. FRANCIS LOOSE.(a)

*Friendly Society—Trustee—Larceny by—Bailee—Treasurer—In whom property vested—18 & 19 Vict. c. 63, s. 18.*

*The prisoner was a trustee of a friendly society (a lodge of Odd Fellows), and appointed, by resolution of the society, to receive money from the treasurer and carry it to the bank. He received the money, but, instead of taking it to the bank, he applied it to his own purposes. He was indicted as a bailee of the moneys of the treasurer R. C., feloniously converting the money to his own use; and also for a common law larceny of the money of R. C.*

*The Friendly Societies Act, 18 & 19 Vict. c. 63, s. 18, vests the property of such societies in the trustees, and directs the property to be laid in the names of the trustees in indictments:*

*Held, that the prisoner could not be convicted of feloniously converting or stealing the moneys of R. C. as charged in the indictment.*

CASE reserved by Williams, J., for the opinion of this Court.

In this case the indictment alleged that on the 20th July, 1859, the prisoner became and was bailee of moneys of Richard Carraway, deceased, to the amount of 40*l.*, and that being such bailee, he fraudulently and feloniously did take and convert the said moneys to his own use, and that the prisoner in manner and form aforesaid feloniously did steal, &c., the said moneys.

There was another count for a common law larceny.

The deceased, R. Carraway, whose money the 40*l.* was alleged

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

to be, was, at the time in question, the treasurer of a lodge of Odd Fellows, which was a friendly society duly enrolled.

The prisoner was one of its trustees.

On the 20th July, 1859, at a lodge meeting, it was proposed and resolved that 40*l.* should be sent to the bank of Messrs. Gurney, at Fakenham, and that the prisoner should take it there. The 40*l.* in gold and silver was taken from a box which was in Carraway's keeping as treasurer, by a person who acted for him, and having been counted, was put into a bag and carried away by the prisoner. Instead of taking it to the bank, he dishonestly applied it to his own purposes, and no such sum was ever placed to the credit of the society.

On these facts it was submitted by the counsel for the prisoner, that the money was not shown to be the property of R. Carraway as alleged in the indictment. *Cain's* case (2 Mood. C. C. 204), it was argued, did not apply, because that case was decided on the construction of the stat. 10 Geo. 4, c. 56, by which the property of a friendly society was vested in the treasurer or trustee for the time being: whereas by the Act now in operation (stat. 18 & 19 Vict. c. 63, s. 18) the property is vested in the trustee or trustees of the society; and that supposing the treasurer to have a special property in the 40*l.*, such property ceased as soon as the resolution of the lodge meeting was acted upon by payment of the money into the hands of the prisoner, who was nominated by the lodge, and not the treasurer, to carry it to the bank. It was further urged that, independently of the statutes, assuming the treasurer to be the owner, the prisoner received the money not as the servant of the treasurer, but as a person not bound to take it, and he was therefore only guilty of a breach of trust. Lastly, it was argued that the prisoner was not bound to pay in that particular 40*l.*, but that any sum of 40*l.* would have sufficed, whereas by the statute he must hold something specific.

The prisoner was convicted, but I respited the judgment until the opinion of this Court should be taken whether the above objections were well founded.

*Metcalfe* (*Drake* with him) for the prisoner.—It is submitted that the property is not well laid in Richard Carraway's name, in any of the counts of the indictment. The case of *Rex v. Cain* (2 Mood. C. C. 204; S.C. 1 Car. & M. 309), relied upon on the part of the prosecution, is not applicable; for that was the case of a benefit society enrolled under the 10 Geo. 4, c. 56, and the 4 & 5 Will. 4, c. 40, and it was held that the property of the society might in an indictment be laid to be in the treasurer by his proper name, for sect. 21 of the 10 Geo. 4, c. 56, provided expressly that the property in such societies "for all purposes of suit, as well civil as criminal," should be deemed and taken to be, and in every such proceeding where necessary, stated to be the property of the treasurer or trustee of the society for the time being, in his or her proper name, without further description. The 18 & 19 Vict. c. 63 (the Act now in force relating to friendly

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societies), sect. 18, vests the property of such societies in the trustees, and directs that in all actions, or suits, or indictments, or summary proceedings before magistrates, touching or concerning any such property, the same shall be stated to be the property of the persons for the time being holding the office of trustees in their proper names as trustees of such society, without any further description. So that Richard Carraway being treasurer only, and not a trustee, had no property vested in him by virtue of the statute, and the property ought to have been laid in the indictment as the property of the trustees. Then, as to R. Carraway's having any special possession of the money stolen, it is found as a fact that it was the duty of Carraway to pay over the money to the prisoner, whose duty it was to take it to the bank. There could not therefore be a felonious taking by the prisoner, who was a trustee and legal owner of the money, as well as being the person specially appointed by the resolution of the society to receive the money from Carraway and take it to the bank. He was not therefore a mere bailee. It does not appear by the 18 & 19 Vict. c. 63, how a trustee is to be made liable to the criminal law for his felonious acts.

No counsel appeared for the prosecution.

POLLOCK, C.B.—We are all of opinion that the indictment in this form cannot be sustained. In *Cain's* case the prisoner had obtained the money wrongfully, and the property in it was vested by the statute then in force, the 10 Geo. 4, c. 56, in the treasurer of the society; but in this case the property is not vested in the treasurer, but in the trustees, by the 18 & 19 Vict. c. 63, s. 18. Moreover, as the prisoner was specially appointed by resolution to take the money to the bank, how can it be said that he stole the money of Richard Carraway as charged in the indictment? For as soon as Carraway parted with the money he had nothing more to do with it. The prisoner may have been guilty of a breach of trust as against the other trustees; but it cannot be said that he stole the money of Carraway. The conviction, therefore, cannot be sustained.

*Conviction quashed.*



## COURT OF CRIMINAL APPEAL.

*April 28, 1860.*(Before POLLOCK, C.B., [CHANNELL, B., BYLES, BLACKBURN,  
and KEATING, JJ.)

REG. v. SAMUEL HUDSON, JOHN SMITH, AND JOHN DEWHIRST. (a)

*Conspiracy to cheat—False pretences—Gaming and wagering—8 & 9 Vict.  
c. 109, s. 17.**The prisoners were at a public-house in the same room with the prosecutor; one of them placed a pencase on the table, and left the room to get writing paper. Whilst he was absent, one of the two who remained took the pen out of the case, and put a pin in its place. The two remaining prisoners then induced the prosecutor to bet the other prisoner, when he returned, 50s., that there was no pen in the case. The prosecutor put his money down, and one of the prisoners snatched it up, to hold. The pencase was then turned up into the prosecutor's hand, and another pen, with the pin fell into his hand, and then the prisoners took the money:**Held, that the evidence was sufficient to support a count for conspiracy, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to cheat, &c.**Held, also that it was immaterial, that the prosecutor intended to cheat the prisoner with whom he betted, if he could.***C**ASE reserved for the opinion of this Court, by J. B. Maule, Esq., barrister-at-law, sitting as Deputy for the Recorder of York.

At the Epiphany Sessions 1860, held for the city of York, the prisoners were jointly indicted and tried before me upon an indictment, the two first counts of which charged them with an offence under the 8 & 9 Vict. c. 109, as follows:—

First count charged, "That on the 18th November, 1859, by fraud, unlawful device, and ill practice in playing at a certain game or sport, to wit, in and by a wager with one Abraham Rhodes, whether a certain pencil case had a pen in it or not, unlawfully and fraudulently they did win from the said Abraham Rhodes, to a certain person to the jurors unknown, a certain sum of money,

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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to wit, 2*l.* 10*s.* of the money of the said A. Rhodes, and so did then and thereby unlawfully obtain such money from the said A. Rhodes by a false pretence, to wit, by the fraud, unlawful device, and ill practice aforesaid, with intent then to cheat and defraud the said A. Rhodes of the same, against the form of the statute in such case made and provided," &c.

The second count charged the prisoners that they unlawfully and fraudulently did combine, confederate, and conspire together, and with divers other persons to the jurors unknown, by fraud, unlawful device and ill practice in playing at a certain game or sport, and by divers other fraudulent devices and false pretences, unlawfully to win from the said A. Rhodes a certain sum of money, to wit, the sum of 2*l.* 10*s.* of the money of the said A. Rhodes, and so then and thereby unlawfully to obtain from the said A. Rhodes, the said sum of money in this count mentioned, by a false pretence, with intent then to cheat and defraud the said A. Rhodes of the same, against the form of the statute, &c.

Third count.—The prisoners were charged with a conspiracy to cheat in the following form:—

"That they unlawfully and fraudulently did combine, confederate and conspire together with divers other persons to the jurors unknown, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to obtain from the said A. Rhodes the sum of 2*l.* 10*s.* of the money of the said A. Rhodes, and unlawfully to cheat and defraud the said A. Rhodes of the same, against the peace, &c.

The evidence disclosed that the three prisoners were in a public-house together with the prosecutor, Abraham Rhodes, and that in concert with the other two prisoners, the prisoner John Dewhirst placed a pencase on the table in the room where they were assembled, and left the room to get writing-paper. Whilst he was absent the other two prisoners, Samuel Hudson and John Smith, were the only persons left drinking with the prosecutor, and Hudson then took up the pencase, and took out the pen from it, placing a pin in the place of it, and put the pen that he had taken out, under the bottom of the prosecutor's drinking-glass, and Hudson then proposed to the prosecutor to bet the prisoner Dewhirst, when he returned, that there was no pen in the pencase. The prosecutor was induced by Hudson and Smith to stake 50*s.* in a bet with Dewhirst upon his returning into the room, that there was no pen in the pencase, which money the prosecutor placed on the table, and Hudson snatched up to hold. The pencase was then turned up into the prosecutor's hand, and another pen with the pin, fell into his hand, and then the prisoners took his money.

Upon this evidence it was objected, on behalf of the prisoners, that no offence within the meaning of the 8 & 9 Vict. c. 109, was proved by it, and that the facts proved in evidence did not amount to the offence charged in the third count.

I thought the objection well founded as to the offence under the

8 & 9 Vict. c. 109, but held that the facts in evidence amounted to the offence charged in the third count, and directed the jury to return a separate verdict on each count, a case having been asked for by the prisoners' counsel, for the consideration of the Court for Crown Cases Reserved.

The jury returned a verdict of guilty on each of the three counts.

The prisoners were sentenced to eight months' imprisonment, and committed to prison for want of sufficient sureties.

If the Court for the consideration of Crown Cases Reserved shall be of opinion, that the above facts in evidence constituted in law any one of the offences charged in the indictment, and was evidence to go to the jury in support thereof, the verdict is to stand for such of the counts in which the offence is laid, to which the evidence applies.

*Price* for the prisoners.—It is submitted that the prisoners have not been guilty of any of the offences charged in the several counts of the indictment. The first two counts of the indictment are framed upon the Games and Wagers Act, 8 & 9 Vict. c. 109, s. 17, which enacts: "That every person who shall by any fraud, or unlawful device, or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly." The object of that provision was not to meet a case like the present. Sects. 8 and 15 show that the provision was directed to the ordinary games played at common gaming houses, and not against tricks like the one in this case.

POLLOCK, C.B.—You may confine your argument to the offence charged in the third count.

*Price*.—As to the third count. To sustain that, the evidence should have shown such a false pretence as *per se* would constitute the ordinary misdemeanor of false pretences.

POLLOCK, C.B.—Why so? This is a count for conspiracy to cheat.

*Price*.—Yes, by false pretences.

CHANNELL, B.—If the count had said merely to conspire, and had omitted the words "by false pretences," it would have been good.

BLACKBURN, J.—Here the prisoners cheated the prosecutor into the belief that he was going to cheat, when in fact he was to be cheated.

*Price*.—This is a mere private deceit not concerning the public, which the criminal law does not regard, but is a deceit against

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which common prudence might have guarded. There is no evidence of any indictable combination to cheat and defraud.

CHANNELL, B.—If two persons conspire to puff up the qualities of a horse, and thereby secure an exorbitant price for it, that is a criminal offence.

*Price.*—That affects the public. At the trial the present case was likened to that of *Rex v. Barnard* (7 Car. & P. 784), where a person at Oxford, who was not a member of the university, went for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods. This was held a sufficient false pretence. The present case, however, was nothing more than a bet on a question of fact, which the prosecutor might have satisfied himself of, by looking at the pencil-case. It is more like an ordinary conjuring trick. Besides, here the prosecutor himself intended to cheat one of the prisoners by the bet.

No counsel appeared for the prosecution.

POLLOCK, C.B.—We are all of opinion that the conviction on the third count is good, and ought to be supported. The count is in the usual form, and it is not necessary that the words "false pretences" stated in it should be understood in the technical sense contended for by Mr. Price. There is abundant evidence of a conspiracy by the prisoners to cheat the prosecutor, and though one of the ingredients in the case is that the prosecutor himself intended to cheat one of the prisoners, that does not prevent the prisoners from liability to be prosecuted upon this indictment.

*Conviction affirmed.*

CRIMINAL LAW CASES.

COURT OF CRIMINAL APPEAL.

June 2, 1860.

(Before COCKBURN, C.J., MARTIN, B., CROMPTON, J.,  
WILLES, J., and BRAMWELL, B.)

REG. v. BRADFORD AND OTHERS. (a)

*Railway—Obstruction of line—Line in course of construction—Not  
completed—3 & 4 Vict. c. 97, ss. 15-21.*

*A line of railway was constructed under the powers of an act of Parliament, and was intended for the conveyance of passengers in carriages drawn by steam-engines, but at the time of the alleged offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of workmen and materials. A railway truck was placed by the prisoners across the line, so as to obstruct the passage of any carriage and to endanger the safety of the persons therein, but its position was discovered, and the truck removed before any collision occurred:*

*Held, that the so placing the truck across the line was an offence within the 3 & 4 Vict. c. 97, s. 15, although the line was not completed and opened, and no actual obstruction took place.*

CASE reserved by the Assistant Judge of the Justices for the county of Middlesex.

John Bradford, Joseph Dimart, Frederick Cleaver, Richard James Bradford, John Butler, Henry Durban, and George Dimart, were tried before me at the General Sessions of the peace for the county of Middlesex, holden at Westminster on the 7th May 1860, upon an indictment, of which the following is a copy:—

Middlesex.—The jurors for our lady the Queen, upon their oath present, that John Bradford, Richard James Bradford, John Butler, Henry Durban, George Dimart, Joseph Dimart, and Frederick Cleaver, on the 8th day of April, in the year of our Lord 1860, at the precinct of Norwood, in the county of Middlesex, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there put and place a

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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certain truck, called a trolly, upon and across a certain railway, there called the Great Western and Brentford Railway, in such a manner as to obstruct a certain engine, to wit, a locomotive steam-engine, then and there using the said railway, against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Bradford, James Bradford, John Butler, Henry Durban, George Dimart, Joseph Dimart, and Frederick Cleaver, afterwards, to wit, on the same day and in the year aforesaid, at the precinct aforesaid, in the county aforesaid, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there put and place a certain truck, called a trolly, upon and across the said railway, called the Great Western and Brentford Railway, in such manner as to obstruct a certain carriage, to wit, a railway carriage, then and there using the said railway, against the form of the statute in such case made and provided.

Third count.—And the jurors aforesaid, upon their oath, do further present, that the said John Bradford, James Bradford, John Butler, Henry Durban, George Dimart, John Dimart, and Frederick Cleaver, on the said 8th day of April, in the year of our Lord 1860, at the precinct aforesaid, in the county aforesaid, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there put and place a certain truck, called a trolly, upon and across the said railway, called the Great Western and Brentford Railway, in such manner as to endanger the safety of persons conveyed in the said carriage, against the form of the statute in such case made and provided.

Fourth count.—And the jurors aforesaid, upon their oath, do further present, that the said John Bradford, James Bradford, John Butler, Henry Durban, George Dimart, Joseph Dimart, and Frederick Cleaver, afterwards, to wit, on the same day and in the year aforesaid, at the precinct aforesaid, in the county aforesaid, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there put and place a certain truck, called a trolly, upon and across the said railway, called the Great Western and Brentford Railway, in such manner as to endanger the safety of persons conveyed upon the said railway, against the form of the statute in such case made and provided.

The prisoners severally pleaded guilty, and judgment was respited until the decision of the Court of Criminal Appeal was obtained upon the case hereinafter stated.

Jno. Bradford, Josh. Dimart and Fredk. Cleaver were committed to the House of Correction for the county of Middlesex, and the other prisoners were discharged on recognisance of bail to appear and receive judgment at a future sessions.

The indictment was framed on the 3 & 4 Vict. c. 97 (an Act for Regulating Railways), by the 15th section of which it is enacted, "That every person who shall wilfully do or cause to be done anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons con-

veyed in or upon the same, or shall aid or assist therein, shall be guilty of a misdemeanor."

By the interpretation clause, the 21st section of the same act, it is enacted, "that whenever the word 'railway' is used in this act, it shall be construed to extend to all railways constructed under the powers of any Act of Parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam, or by any other mechanical power."

The railway in question was constructed under an act of Parliament, and was intended for the conveyance of passengers in carriages drawn by the power of steam, but at the time of the committing the alleged offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and of workmen, who were from time to time conveyed upon the railway by carriages drawn by the power of steam.

A railway truck was placed by the prisoners across the railway, and was so placed as to obstruct the passage of any carriage, and to endanger the safety of persons conveyed therein, but its position was discovered, and the truck removed before any collision occurred.

It was objected that upon these facts the case was not within the statute, because, first, the railway was not used for the conveyance of passengers for hire; and secondly, because no actual obstruction took place.

I overruled both objections, and I have now to submit to the Justices of either bench and Barons of Exchequer whether I was right in so doing.

W. H. BODKIN, Assistant-Judge.

*Ribton* for the prisoners.—There was no offence committed within the meaning of the 3 & 4 Vict. c. 97, which expressly states that the railway must be one intended for the conveyance of passengers. In the present case the railway at the time of the commission of the alleged offence was not used for the conveyance of passengers. This statute was passed for the protection of the public, and the provisions were all aimed at the prevention of accidents to the public, and for this simple reason, because the Legislature could not control a railway not yet made. Until the railway was completed and opened, the works remained a mere private enterprise, and private property as much as if they were in a private garden. The only words which could bring the case within the act are to be found in the interpretation clause, that the word "railway" is to mean a railway intended for the conveyance of passengers. But the word "intended" does not necessarily mean *in futuro*, but merely means intended at the time when the railway is constructed and finished; and this view is consistent with the preamble: (*Dwarris on Stat.* 705.) If the word "intended" meant *in futuro* from the date of the first step, then it would lead to absurd consequences, for it might be held

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that after the first sod was turned, and though no line was yet laid down, this stringent penal statute would apply to every obstruction put upon the line.

COCKBURN, C.J.—Suppose a railway finally completed, and not opened, but ready to be opened, and that a trial trip was taken, and some one wilfully put some obstruction on the line, would that be within the statute.

*Ribton*.—That would be nearer than this case, but it would not be within the statute.

CROMPTON, J.—If the works had only been partly laid down, it might not be within the statute, which speaks of it as a railway.

*Ribton*.—In this case it was not a complete railway. It could not be opened, for the Government inspector had to examine it previously.

BRAMWELL, B.—Suppose there had been a goods train only, and an obstruction had been put. Would that be within the act?

*Ribton*.—I think not. That however assumes that there is a complete railway opened and used. Here there were no passengers to be endangered, and no railway opened.

COCKBURN, C.J.—Still there was one carriage and engine upon the line. It has been constructed and is intended to be used, though not actually opened. This is within the mischief of the act.

*Ribton*.—This is a highly penal statute, and the court will not give a construction to the word “intended” which would bring within the act all those who put anything on the line after the first sod had been taken up. There is another objection: there must be an actual obstruction—that is, some train or engine must be actually obstructed.

MARTIN, B.—You say that if a person put a stone or piece of iron on a line of railway, it is no offence within the act, unless and until some engine is actually obstructed.

CROMPTON, J.—The statute says—“Shall wilfully do or cause to be done anything in such manner as to obstruct.” Does not that mean if the obstruction is put in such a place and such a manner that any engine coming along may be obstructed?

*Ribton*.—That is not the plain meaning of the words. It would be a question for the jury whether the thing put did endanger the safety of passengers. The act merely means where the person shall actually obstruct an engine.

BRAMWELL, B.—Suppose an act provided against throwing things out of a window in such a manner as to endanger the passengers. Would not the act of throwing out of the window in such a manner be an offence, though no passenger was actually hurt?

*Ribton*.—I think not. Again, there were no passengers in the sense of the statute. They were merely workmen carried along



the line for the private convenience of the railway contractor. They were not passengers or persons conveyed for hire.

COCKBURN, C.J.—Surely, the workmen are “persons conveyed.”

*Ribton*.—The meaning of those words seems to be “passengers for hire.” It could not be said, where there is a train of goods and nobody but the guard or driver is with it and there is an obstruction, that that would be within the act.

COCKBURN, C.J.—If there are a guard and stoker only on the train, would they not be passengers within the statute? They are “persons conveyed.”

*Digby*, for the prosecution, was not called upon to argue.

COCKBURN, C.J.—I am of opinion that there is really no difficulty in this case. We must assume as a fact that the railway was completed, and all that was required to be done was to open it for the public traffic. In the meantime, and before this final stage, the workmen were occasionally conveyed to and from particular spots of the line where their presence was necessary, in order to complete it and make all ready for the purpose of the line being thrown open. The question is, whether persons who placed obstructions on the line under these circumstances committed an offence within the 15th section of the 3 & 4 Vict. c. 97? It appears the parties were mere boys, and it might be a question whether it was worth while to prosecute them; still the prosecution was instituted, and we are to take the facts as they are stated. The prisoners did put an obstruction on the line, and they put it in such a position as to endanger the safety of the persons conveyed. I am of opinion that such a case comes within both branches of the alternative stated in the section. There was an obstruction put on the line, and it was put so as to endanger the safety of the persons conveyed. It was contended by the counsel for the prisoner that there can be no obstruction until some train be actually obstructed; but such a construction cannot be maintained. The object of the Legislature was obviously to prevent any disaster to those using the railway, and to punish those who put obstructions in such manner as was likely to cause such disaster. This case is, therefore, within the intention of the statute, and, though in the ordinary course of things it would generally be after the railway was fully opened, that the public required to be protected, yet an obstruction put before that time is within the mischief as well as the words of the statute. The conviction will therefore be affirmed.

MARTIN, B., CROMPTON and WILLES, JJ., and BRAMWELL, B., concurred.

*Conviction affirmed.*

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## COURT OF QUEEN'S BENCH.

June 4, 1860.

(Before COCKBURN, C. J., WIGHTMAN, CROMPTON, and BLACKBURN, J.J.)

REG. v. THE JUSTICES OF RICHMOND, SURREY.(a)

*Justices—Interested—Waiver of objection—Malicious trespass—Assertion of a right.*

*The surveyor of the roads directed trestles to be put at intervals on either side of a road, on which fresh granite had been laid, to confine the traffic to a particular part of it. A. drove his carriage against the trestles to knock them down, in alleged assertion of a right, he deeming the surveyor to have no power so to put the trestles for this object. One of the trestles was injured, and on a summons against A., under the Malicious Trespass Act, the justices convicted and fined A. 1s.*

*By a local act the justices were made vestrymen, and became interested in the property in the trestles, and also in the fine:*

*Held, first, that the justices had jurisdiction to convict: and secondly, that in order to obtain a certiorari to quash the conviction on the ground of the justices being interested, the party should show on the face of his affidavits that neither he, nor his advocate before the justices, knew of the objection at the time of the hearing.*

**T**HIS was a rule nisi for a *certiorari* to remove a conviction by certain Justices for the Richmond Division of the county of Surrey, whereby Lord Huntingtower was convicted of wilfully injuring certain trestles on a highway near Richmond, Surrey.

The applicant resided at Richmond, and had frequent occasion to drive along the highway towards Petersham. On the occasion in question he was driving along the Lower Road, Richmond, when he found certain wooden stools or trestles put upon the road at intervals, on alternate sides, by direction of the surveyor of highways, the object of which was to compel those who drove to keep in the middle of the road, on which fresh granite had been laid down. Lord Huntingtower being under the belief that such obstructions on the highway were illegal, and being anxious to try

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

the question how far they were justifiable, purposely drove against the trestles, and overthrew several of them. He did not intend to do any damage to them, but in one instance damage was caused by the trestle falling over. Lord Huntingtower afterwards went and informed the police of what he had done, and the object with which he had done it. The inspector summoned him before the Justices, charging him with wilfully damaging certain trestles, the property of the vestrymen of Richmond. Having acted with the view of raising the legal question, his Lordship attended by his family solicitor before the Justices, and stated the reasons of his conduct, and contended they had no jurisdiction, as his Lordship acted under a fair and reasonable supposition of a right.

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The Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, s. 24, enacts, that "if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, &c., being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, &c.; provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, but that every such trespass shall be punishable in the same manner as before the passing of this act."

The Justices, however, did not think the case came within this proviso, and convicted Lord Huntingtower of maliciously damaging and injuring the trestle, and ordered him to pay a fine of 1s.

*Hannen*, in moving for the rule, contended that Lord Huntingtower had acted only with a view to raise an important question, and that the slight damage that had occurred to the trestle was not done wilfully, but accidentally. The case fell within the proviso, and the Justices had no jurisdiction.

CROMPTON, J.—The word "reasonable" is put in the proviso. Can you contend that there was a reasonable supposition of a right? This regulation of roads newly repaired is well known and generally understood, and it was not reasonable to disturb it. If there was an obstruction, the parties might have been indicted. Every person is not to be allowed to take the law into his own hands in this way.

*Hannen*.—There was no intention to damage the trestle.

COCKBURN, C.J.—Lord Huntingtower drove against the trestle, and so did unnecessary damage. The Justices may have thought that not a right thing to do.

*Hannen*.—There is another objection; three of the Justices present, and acting, were vestrymen of the parish, and so owners of the property injured. The fine also goes to the vestrymen. Under an old local act the vestrymen are intrusted with the care and repair of the road. Lord Huntingtower was not aware of this disqualification of the Justices at the hearing of the summons.

By the COURT.—On the ground of the three Justices being

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interested, you may take a rule; but as to the other objection to the conviction there was some evidence that the applicant had not a fair and reasonable supposition of a right, and the Justices had jurisdiction.

*Cohen* showed cause against the rule.—As to the objection of the Justices being interested, I have an affidavit which states the belief of the Justices that Lord Huntingtower knew that the Justices resided in the parish of Richmond; and if so, it was not open to him to take the objection, for every one is presumed to know the law, and the local act makes the resident Justices, vestrymen *ex officio*. *Dimes v. The Grand Junction Canal Company* (3 H. of L. 759; Paley on Conv. 38); *Reg. v. The Cheltenham Commissioners* (1 Q. B. 467). The maxim *Consensus tollit errorem* applies.

CROMPTON, J.—The maxim cannot apply to such a case as this, where the party does not really know of the existence of the disqualification, but only by a legal fiction.

*Cohen*.—Then it appears that the defence at the hearing of the summons was conducted by the family solicitor; and, although the solicitor, who resides in Richmond, makes an affidavit in support of the rule, it does not appear that he did not know of the objection.

*Lush and Hannen*, in support of the rule.—Although the solicitor resides in Richmond, his practice is in London; and if permission is granted, an additional affidavit will be filed, according to the fact, that he was not aware of the objection at the time of the hearing.

COCKBURN, C. J.—The objection taken is of a very technical nature, as it cannot be supposed that the Justices could have been influenced by their infinitesimal interest in this one shilling fine. The Justices properly convicted Lord Huntingtower, for it was not necessary for him to drive against the trestle and knock it down in order to raise the question.

*Lush*.—Then the question is, did Lord Huntingtower at the hearing consent to the interested Justices acting? There is no evidence that either Lord Huntingtower, or his attorney, knew of the objection. The local act was an old one, and is out of print.

CROMPTON, J.—It is quite consistent with the materials before us, that his attorney knew all about the act.

*Lush*.—Even if the attorney knew of the objection and said nothing, still that does not amount to acquiescence in the interested Justices deciding the case.

COCKBURN, C. J.—Acquiescence by the advocate is acquiescence by the principal.

COCKBURN, C. J.—I am of opinion that the objection cannot be sustained, and that this rule must be discharged. The party now objecting is bound to show that at the time of the hearing of the summons neither he, nor his representative who conducted his defence, knew that the Justices were interested. It was not

necessary that the attorney should deny knowledge of the fact, if the party's non-affidavit stated it. But in the present case Lord Huntingtower makes an affidavit, and denies knowledge on his part, and the attorney also makes a long affidavit; and it nowhere appears that the attorney was ignorant of the objection at the time of the hearing of the summons, though it might well be that he, an attorney residing in Richmond, knew of the local act affecting its management, by which the Justices were made vestrymen and became interested in the fine. The objection is *strictissimi juris*, and as there is no objection to the conviction on the merits, this rule must be discharged.

The rest of the Court concurred.

*Rule discharged.*

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## COURT OF QUEEN'S BENCH.

REG. v. THE LONGTON GAS COMPANY. (a)

(Before COCKBURN, C.J., WIGHTMAN, CROMPTON, and HILL, J.J.)

*February 25, 1860.*

*Indictment—Nuisance—Highway—Obstruction—Laying down gas pipes.*

*Town commissioners empowered by statute to light the public streets with gas, and to break up the foot-ways and carriage ways for laying down the gas-pipes, and to enter into contracts with other companies to execute such works, cannot confer on a private gas company not having any parliamentary powers, authority to break up the footways or carriage-ways for the purpose of laying down service pipes from private houses, and connecting them with the main pipes.*

*A householder who gives directions to have such works done for the purpose of lighting his house with gas, is liable to be convicted as a principal giving orders to commit a nuisance.*

**I**NDICTMENT for a nuisance in breaking up the paths and streets of the town of Longton, Staffordshire.

The first count alleged that the defendants on the 9th August, 1858, in the High-street in Longton aforesaid, being the Queen's common highway used for all, &c., to go, return, pass and repass on foot in and along the same at their free will and pleasure, unlawfully and injuriously did dig up the pavements of the said

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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footway, and put and place bricks, earth, &c., upon the said footway, and did make therein certain holes and trenches, and laid and placed down iron pipes in the same, whereby the highway aforesaid was obstructed and incumbered.

There were other counts charging the defendants with creating a similar nuisance in other streets and roads in the town.

The case was tried before Crompton J. at the last Stafford Spring Assizes, when a verdict of not guilty was entered as against four of the defendants, and a verdict of guilty against all the other defendants, subject to the opinion of the Court on a case.

The town of Longton is in the district known as "The Potteries," and contains about 15,000 inhabitants. It is two miles from Stoke-upon-Trent, where the works of the Stoke Fenton and Longton Gas Company, hereinafter called the Stoke Fenton Company, are situate.

Before the 2 Vict. c. xlv. Longton was not lighted by gas at all. By that act, which was "An Act for establishing an effective police in places within or adjoining to the district called the Staffordshire Potteries, and for improving and cleansing the same, and for better lighting parts thereof," Longton and several other towns and places were divided into four districts, called respectively the Longton, the Fenton, the Stoke, and the Trentham districts. Each district was placed under the government and direction of separate and distinct commissioners of police.

By sect. 68 power was given to the commissioners to light the public streets and places of Longton with gas or oil, and to execute the necessary works, or to enter into contracts with any company or other persons to execute the same, but not to fix any lamps, or carry any pipes through or against any dwelling-house or private building without the consent in writing of the owners or occupiers thereof.

By sect. 69 the commissioners were empowered, in case they should think proper to light the said public streets and places, to dig and break up the soil of any footways and carriage-ways, and to lay down pipes, &c., and from time to time to take up and repair the same, restoring the soil to its former state.

By sect. 83 it was provided that the expenses of lighting should be defrayed by a rate on the occupiers.

Soon after the passing of the said act, the Stoke Fenton Company was established, and subsequently incorporated by 21 Vict. c. xi., for the purpose of supplying Stoke Fenton and the places adjacent with gas; and the company erected gasworks, and laid down mains and pipes for public and private lighting through the streets and footways of Longton, and other places. Since that time the commissioners have from time to time contracted with the company, for lighting the public streets and places within Longton, and other portions of the Longton district; and the company have accordingly lighted the public streets and places, and also private houses and buildings. The only authority which they had for breaking up the streets and footways, and laying

down the mains for public or private lighting, was the permission given to them by the Longton Commissioners under the said act.

While the 21 Vict. c. xi. was before Parliament, a company was established under the name of the Longton Gas Company (Limited), hereinbefore called the Longton Company, and in August, 1858, the last-mentioned company began to erect their works.

The contract entered into by the commissioners with the Stoke Fenton Company expired on the 1st May, 1858, and was not renewed. On the 15th June they contracted with the Longton Company for the supply of gas to the public lamps for the term of three years, upon the same terms as they had previously contracted with the Stoke Fenton Company, and also conferred on the Longton Company the same powers for breaking up the streets and laying pipes within the Longton district which they had conferred on the Stoke Fenton Company. The Longton Company accordingly made a contract with one William Moore, for laying the necessary mains and pipes for the purpose of carrying out their contract with the commissioners, and the work was commenced on the 9th August, 1858.

The only act proved against Knight, one of the defendants against whom a verdict of guilty was entered, was that he being the owner and occupier of a house, contracted with the Longton Company to have it lighted, and that he then directed the workmen of the Longton Company to lay down the service pipes for the purpose of connecting his house with the company's mains, which was accordingly done. Another defendant, William Moore, was the contractor with the Longton Company as aforesaid; another, William Hunt, was the manager of the company; and the others were labourers in the employ of the company. These defendants besides making the necessary excavations for laying down the mains and carrying service pipes to the various public lamps in the Longton district, also caused to be dug a great many other trenches in the different parts of the streets and highways of the district for the purpose of laying down service pipes, in order to supply gas to private individuals for the lighting of private houses and shops.

The defendants used all reasonable dispatch in digging the trenches and laying down the pipes, and in restoring the streets and highways; and during the time that the trenches were being dug and were open, and the pipes being laid, the streets and highways were not otherwise interfered with than was necessary for digging the said trenches and laying the said pipes. Before the said works were commenced, the Longton Company had obtained the consent of the board of surveyors of highways of the town of Longton, and the approval and consent of the inhabitants of Longton, assembled in a public meeting convened by the chief bailiff.

The lord of the manor of Longton had also given a similar consent.

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The questions for the opinion of the court were: (1) Whether under the circumstances Knight ought to be found guilty.

(2) Whether the verdict of guilty was to stand against the other defendants, as regards the acts done for the purpose of the public lighting of the streets, roads, &c.

(3) Whether the verdict of guilty was to stand against the other defendants, as regards the acts done for the purpose of supplying gas to private individuals for the lighting of private houses, shops, buildings and places.

*Bovill* (*Pigott*, Serjt. and *Scotland* with him) for the prosecutors. The defendants could have no authority to break up the streets, except it was conferred by some statute. Under the 2 Vict. c. xlv., the commissioners have power to authorise the breaking up of the streets for public purposes only, not for lighting private houses. In the Gasworks Clauses Act 1847, 10 & 11 Vict. c. 15, ss. 6–12, a variety of provisions and safeguards is introduced to prevent undue interference with the public rights by the breaking up of streets for the purpose of laying pipes. A mere private joint-stock company, like the Longton Gas Company, not incorporated or authorised by act of Parliament, has no authority to break up the public street for the purpose of laying down mains and service pipes. The parties who gave their consent, as stated in the case, could not confer any power to do what the defendants did. Cases cited:—*Ellis v. The Sheffield Gas Consumers Company*, 2 Ell. & Bl. 767; *Bradbee v. The Governors of Christ's Hospital*, 5 Scott N. R. 79.

*Sir Fitzroy Kelly* (*Huddleston* and *M'Mahon* with him) for the defendants.—The question now to be decided was not raised in *Ellis v. The Sheffield Gas Consumers Company*. In *Rex v. Jones* (3 Camp. 230), Lord Ellenborough said: "If an unreasonable time is occupied in delivering beer from a dray into the cellar of a publican it is a nuisance. A cart or a waggon may be unloaded at a gateway, but this must be done with promptness. So, as to the repairing of a house; the public must submit to the inconvenience necessarily occasioned: but if this inconvenience is prolonged for an unreasonable time, the public have the right to complain, and the party may be indicted for a nuisance." It is found that the works of the defendants were done with reasonable dispatch. The soil below the surface of the streets belongs to the owners of the adjoining land, *ad medium filum viae*. [COCKBURN, C.J.—The public acquire the right, subject to the right of the individual owners to have the use, for instance, of a hole for the coal-cellar.] Every dedicatory of a way must be taken to have reserved to himself rights for the enjoyment of his own property, *e.g.*, for supplying his house with light, fuel and water. If a person is to be restricted to using the highway as a way merely, he could not put a ladder up for the purpose of doing anything to his house: (*R. v. Ward*, 4 Ad. & Ell. 384; *R. v. Betts*, 16 Q. B. 1022; *R. v. Russell*, 23 L. J. 173, M.C.)

*Cur. adv. vult.*



COOKBURN, C.J.—The indictment in this case charged the defendants with obstructing certain highways and footways in the town of Longton in the county of Stafford, by placing earth and bricks there, and by digging trenches therein. At the trial, certain of the defendants were convicted, subject to the opinion of this court upon a special case, from which the following facts appeared:—In the town of Longton there was a gas company, established by an act of Parliament, which incorporated the provisions of the General Gas Companies Act. There was also a body of commissioners for the purpose of public lighting, with powers to lay down mains and pipes for the public lighting of the town, but with no powers to supply or lay down pipes for the supply of private houses or individuals. The commissioners, who had formerly been supplied with gas by the old company, entered into a resolution to transfer, and did duly transfer, their powers to the defendants the Longton Gas Company (Limited), who were a joint-stock company, but without any parliamentary powers as a gas company. The indictment was preferred against the company for obstructing the public highway by opening trenches and laying down pipes, and conveying gas to the public lights, and to private houses. On the argument before us, it was conceded on the part of the Crown that the conviction could not be sustained against the defendants in respect of the acts done in making and laying down mains and pipes for the public lighting of the town, the acts in such respect being authorised by the powers transferred to them by the commissioners. It was admitted on the part of the defendants, that they had no parliamentary powers which gave them authority to create obstructions, or lay down pipes for private supply. The question, therefore, was confined to the acts done by the defendants in laying bricks and earth and digging trenches in one instance across the street, but in the other instances across the footway of the street, for the purpose of laying down supply or service pipes to private houses from the mains laid down under the powers of the commissioners for public lighting. It appeared that these service pipes had been laid down by the joint-stock company at the request and by the direction of the owners of the houses; and that they had been so laid down carefully, without creating any unnecessary nuisance. It was not disputed, however, that the highway was obstructed, so as to amount to an indictable nuisance, unless the defendants were justified in committing the acts complained of in the exercise of the right of each householder, to make such slight temporary obstruction on a highway or footway as might be necessarily incidental to the enjoyment of his property, such, for example, as the obstruction caused in using the common coal-holes in the pavements, the unloading of carts, the putting up boards for repairing and other similar temporary obstructions. We are of opinion that the present case does not fall within any of the exceptions to the general law as to the obstructions of highways. We find no authority, according to which so wide and large an exception to the general rule is established, as would allow either a

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private person, or any body acting at the request of private persons, to open the streets for the purpose of supplying private houses with water or gas from sources from which a supply of water or gas may be procured. Such an act is not in any respect a user of the highway such as occurs when a cart or carriage stops before a door, or where goods are unloaded on the highway, to be immediately taken into the house. Such matters may well be said to be a use of the highway as a highway; and this is made more clear by the rule, that when there is an excess or abuse, in such case, the party is indictable. Thus, where, instead of using the highway merely for taking the goods in, the party sawed blocks of wood in the street before taking them in, he was held to be indictable for so doing. The case put of the coal-holes in the pavement of a street is perhaps the one apparently most in favour of the defendants. It is not, however, to be assumed that there is any right in the owner of a house, to open the pavement to make a new coal-hole, where none has existed before. He could not, we think, make a new hole in the middle of the street if his cellar extended so far. In many instances, no doubt, such coal-holes may be of right, as where they have been made when the houses were first built, and so as was suggested during the argument, the highway has been dedicated subject to such use. In many cases of a single obstruction for a short time, for the purpose of obtaining some such advantage, there would probably be no indictment, although the party might strictly be liable to indictment, and although, were such instances multiplied, it might become necessary to indict. It may be also that the almost universal use of coal-holes may have led to their not being complained of, as they might be, from their being regarded as a usual, if not a necessary means of enjoying the house, if made in their usual place. They do not, in any of these respects, appear to be analogous to the case now before us, for there is no evidence that the right here claimed originated in any reservation, nor is its exercise matter of absolute necessity, nor is it one ordinarily exercised by the owners of property, except under parliamentary powers, and subject to regulations imposed for the protection of the public. The case is not one of absolute necessity either for the party or the public, as in the case of a hoarding required during the repairing of a house, to protect the public, or in the case of putting a ladder against a house to clean windows, or to escape in the case of fire. General convenience is greatly against the allowing private persons or companies, without parliamentary powers, to interfere from time to time with the public streets. The making such openings from time to time for water, gas, sewage and other purposes, and the opening of the streets for repairs and alterations, are a serious inconvenience even when done under the restrictions which an act of Parliament puts upon the persons clothed with parliamentary authority so to act; and it would be difficult to see how far the annoyance might extend, if unauthorised dealings of this nature with the highways were allowed. Is every private person to be at liberty to open the street for the purpose of laying

down a pipe to any gasworks, or to any conduit of water, or to any well or fountain in a market-place? How far is such right to extend? If everybody may lay down a pipe from the nearest water, or gas, how great would be the inconvenience from the continual opening of the streets for the first laying down and for the constantly recurring purpose of repairing. Were such private rights as to gas, sewerage, and water-pipes to be allowed, the highways would be in a constant state of obstruction. The present is an exceptional case, where it happens, from the fact of the mains being laid for public purposes, that it is more easy to get at the supply of gas, than in ordinary cases; but this ought not to affect the principle. The case does not seem to us to fall within what may be called the ordinary incidents and rights, which in common sense and from common use, are understood to appertain to the enjoyment of property. On the contrary, such a right as is here claimed of interfering with the streets is never exercised except under the authority of acts of Parliament conferring special powers, with great care and under proper control, in the case of gas by placing the companies supplying it under the provisions of the General Gasworks Companies Act, according to which the parties are subjected to wholesome restrictions, and to the control of the magistrates. We think, therefore, that the obstructions in question are indictable, and that the conviction was right; and the verdict must be entered accordingly. A question was raised, but not very seriously pressed, as to whether one of the defendants, who had given directions to have the particular works done to his own house, was properly convicted. On this we entertained no doubt, as the party giving orders to commit a nuisance is a principal in the transaction. It was agreed at the trial that the defendants should be at liberty to turn the case into a special verdict, if the Court should think fit to give them leave so to do, and considering the importance of the question, we think it quite right that such leave should be given. If that course be taken, that which was conceded in the argument, must be found as a fact in the special verdict, namely that there was obstruction to the road; and the question must be, as to whether the parties are indictable for making such obstructions under the circumstances. Our judgment will be for the Crown as to the obstructions arising from laying down the service pipes.

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*Judgment for the Crown.*

## COURT OF QUEEN'S BENCH.

January 26, 1860.

CLARK v. HAGUE. (a)

*Cruelty to animals—Cock-fighting—Aiding or assisting at—*  
 12 & 13 Vict. c. 92, s. 3.

The 12 & 13 Vict. c. 92, s. 3, enacts that every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other animal, shall be liable to a penalty not exceeding 5l. for every day, &c. And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, &c., cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5l. for every such offence:

Held, that aiding or assisting at the fighting or baiting must occur at a place kept or used for the purpose, to constitute an offence under the above section.

CASE stated by Justices under 20 & 21 Vict. c. 43.

At a Petty Sessions in and for the division of Loughborough, in the county of Leicester, on the 7th April, 1859, before two of Her Majesty's Justices of the Peace in and for the said county, an information in writing, preferred by Samuel Hague, of Loughborough, licensed victualler, hereinafter called the respondent, under sect. 3 of 12 & 13 Vict. c. 92, was heard and determined, in which information it was alleged that the appellant Clark, on the 2nd March then last past, at the parish of Loughborough, did encourage, aid and assist at the fighting of two cocks then being fought in a certain place (to wit), a bowling-alley there in the occupation of the said appellant, then kept and used for the purpose of fighting cocks, contrary to the provisions of the said statute, intituled "An Act for the more effectual prevention of cruelty to animals." And upon such hearing the appellant was duly convicted, "for that he the said appellant, on the said 2nd day of March, at the parish of Loughborough aforesaid, did encourage, aid and assist at the fighting of two cocks then and there being fought, contrary to the provisions of the said act, intituled "An Act for the more effectual prevention of cruelty to

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

animals." And the said appellant, for his said offence, was adjudged to forfeit and pay the sum of 10s. to be paid and applied according to law, and also to pay to the said respondent the sum of 15s. for his costs in that behalf, and that if the said several sums should not be paid forthwith, the said appellant should be imprisoned in the House of Correction at Leicester, in the said county, for the space of fourteen days, unless the said several sums should be sooner paid.

And the said appellant being dissatisfied with such determination, upon the hearing of the said information, as being erroneous in point of law, did, pursuant to sect. 2 of 20 & 21 Vict. c. 43, apply in writing, within three days after the said determination, to the said Justices to state and sign a case setting forth the facts, and the grounds of such our determination as aforesaid, for the opinion thereon of the Queen's Bench.

At the hearing of the aforesaid information it was proved on the part of the informant, the respondent in this appeal, that on the 2nd March, at a bowling-alley belonging to the appellant's licensed victualling house at Loughborough aforesaid, two cocks were fought by the appellant and one John Taylor. We were of opinion on the evidence produced before us that the said appellant and the said John Taylor did resort to the said bowling-alley with the intention of causing the said cocks to fight together there, and that they did encourage, aid and assist at the fighting of the said two cocks at the said place, but it was not proved before us that in any other instances had cocks been fought there.

Upon the hearing of the said information it was contended on the part of the appellant that there was no offence committed within the intent and meaning of the 3rd section of the 12 & 13 Vict. c. 92, inasmuch as the said section only applied to encouraging, aiding, or assisting at the fighting of cocks in any place regularly kept or used for that purpose, as mentioned in the first clause of the said section, viz., a place so kept or used for the purpose of fighting any cocks, as to subject the keepers thereof to the penalty fixed by the said section, and that it did not appear that the said bowling-alley was a place so kept or used.

We, however, were of opinion that the words "every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l*," contained in the concluding clause of the said 3rd section, applied to the encouraging, aiding, or assisting at the fighting of cocks in any place, and that the words "as aforesaid" meant "other animals as aforesaid" and not, as was contended by the appellant, "the place as aforesaid," namely, a place kept or used for the purpose of fighting any bull, bear, badger, dog, cock, or other kind of animal, as mentioned in the first clause of the said section; and being also of opinion that the evidence given before us brought the case within the concluding clause of the said 3rd section, we convicted the said appellant of encouraging, aiding and assisting

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at the fighting of two cocks at Loughborough, considering, according to our construction of the act as above stated, that the portion of the information which alleged that they were fought in a place kept or used for the purpose of fighting cocks was not a material allegation, and consequently might be treated as irrelevant matter.

The question of law arising on the above statement is, whether it is an offence within the intent and meaning of the 3rd section of the said statute, to encourage, aid, or assist at the fighting of cocks in any place, or only in a place so kept or used for the purpose of fighting cocks as to subject the keeper thereof to the penalty prescribed in the first clause of the said section.

*Hayes*, Serjt., for the appellant.—It is no offence under the 12 & 13 Vict. c. 92, s. 3, to fight cocks, unless in a place kept for that purpose. The object of the Legislature was to put down places kept for bull-baiting and cock-fighting, and it does not meet the case of fighting cocks on premises not kept or used for that purpose.

*HILL*, J.—If a person in his own poultry-yard encouraged two cocks to fight, would he be within the enactment?

*Hayes*.—No. Statutes referred to, 3 & 4 Will. 4, c. 19, and 5 & 6 Will. 4, c. 59.

No counsel appeared for the respondent.

*Cur. adv. vult.*

*BLACKBURN*, J.—This is a case stated under the 20 & 21 Vict. c. 43, for our opinion on a question of law, stated to be, whether it is an offence within the intent and meaning of the 3rd section of the 12 & 13 Vict. c. 92, to encourage, aid, or assist at the fighting of cocks in any place, or only in a place so kept or used for the purpose of fighting cocks as to subject the keeper thereof to the penalty prescribed by the first clause of the section. The 3rd section enacts, “that every person who shall keep or use, or act in the management of any place, for the purpose of fighting, or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid, provided always that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed to be the keeper thereof.” So far the meaning of the act is plain; it creates a substantial offence, that of keeping or using a place for the purpose of baiting animals. The act proceeds in the same section: “And every person who shall in any manner encourage, aid, or assist at the fighting, or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence.” The Legislature here employs words apt, if intended to describe the accessories to the

offence stated previously in the section, but not apt if intended to create a fresh offence. It cannot be supposed that the Legislature intended that those who were the principals in fighting the animals should be exempt from the penalty imposed on those who encourage, aid and assist therein; and treating it in this way, we are much confirmed by looking at the former act, 5 & 6 Will. 4, c. 59, s. 3, for which the present enactments are substituted, and which clearly only affected those who frequented such places. We think, therefore, the intention of the Legislature was, that the penalty should be imposed on those who were aiding or assisting at the fighting or baiting of any bull, bear, badger, dog, cock or other animal as aforesaid," that is, "at any place so kept or used for any of the purposes aforesaid."

*Conviction quashed.*

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## Ireland.

## COURT OF CRIMINAL APPEAL.

June 18, 1860.

(Before LEFROY, C.J., O'BRIEN, J., HAYES, J., FITZGERALD, B.,  
and FITZGERALD, J).

REG. v. TOWEY.(a)

*Perjury—Evidence in corroboration.*

*It is not necessary that the evidence, produced to corroborate the first witness to an assignment of perjury, should amount to a direct contradiction of the statement made by the prisoner, upon which the perjury was assigned.*

*Where, therefore, the alleged perjury was, that the prisoner swore that a certain promissory note was not in his handwriting, and one witness having sworn that he saw the prisoner write the note, a second witness was produced, and in corroboration stated that the prisoner said at a subsequent meeting "that he could prove the note," although at the time there was none before him.*

*Held to be sufficient.*

THE indictment in this case, upon which the prisoner was convicted, charged that, on the 8th day of July, 1859, on the trial of a *civil bill* then pending before the chairman of the county of Mayo, at Ballina, in which one Owen Stenson was plaintiff, and one Patrick ToweY was defendant, and in which it became a material question to ascertain whether a certain promissory note then produced, or any part of it, was in the handwriting of the prisoner, and whether the name "Thomas ToweY," as a witness to the said note, was in his handwriting. The prisoner being duly sworn, falsely and maliciously deposed and swore in the words following: "The note produced is not in my handwriting, or any part of it, and the name 'Thomas ToweY,' as a witness, is not in my handwriting," whereas in truth he then well knew that the note, and every part thereof, was in his handwriting, and that the name "Thomas ToweY" was in his handwriting.

On the trial, before Mr. Baron Fitzgerald, at the last assizes

(a) Reported by A. D. McGURR, Esq., Barrister-at-Law.



for the county Mayo, the pendency of a civil bill by Owen Stenson, as payee against Patrick Towey, as one of the makers of a promissory note, dated 5th January, 1857, for the payment of 5*l.* 10*s.*, nine months after date, was proved; also that the civil bill came on for trial before Sir Coleman O'Loughlan, as chairman for the said county, at the quarter sessions holden at Swinford, and was then adjourned by him to the sessions next holden at Ballina, in consequence of the prisoner not having attended as a witness. It was also proved that the said civil bill again came on for trial in July, 1859. That on such trial the prisoner was examined as a witness, and being duly sworn, stated that the promissory note then produced to him was not, &c. (as in the assignment for perjury). The following is a copy of the note:—

“£5 10*s.*

“Nine months after date we jointly and severally do promise to pay Owen Stenson the sum of five pounds ten shillings sterling, value received.

“Dated this 5th day of Jan., 1857.

“Witness present,

“THOMAS TOWEY.”

their

“PATRICK × TOWEY.

“JAMES × TOWEY.

marks.

This note was retained by direction of the chairman, since the trial of the civil bill, he having directed a prosecution for perjury against the prisoner, and was now produced by the clerk of the Crown.

The promissory note, when produced, had a piece of brownish coloured paper pasted on, and partially covering the back of it.

Owen Stenson was examined for the prosecution, and stated that he had sold a cow to Patrick and James Towey for 5*l.* 10*s.*, on the agreement that he was to be paid 3*l.* that year, and 2*l.* 10*s.* the next. That the only payment he ever received was a stamped paper, that the prisoner wrote on that paper, that he saw him write on it, and also saw Patrick and James Towey put their marks on it. That the prisoner was present at the time, and read the paper to him, as witness could not read; that the sum mentioned on the reading was 5*l.* 10*s.*, and also that *the payment was to be at different times.* That he never got any other paper from either of the Toweys, and that the promissory note above-mentioned was that paper.

On cross-examination, he stated that the prisoner was his son-in-law, that the note was put into a box, of which the wife of the prisoner kept the key; that the note was kept in the box until her death, which happened about a month after the sale of the cow; that there was also money in the box, and some things belonging to his daughter, the wife of the prisoner. That after his daughter died the prisoner brought to him the note and the money from the box, together with *another* stamped paper which had been in the box along with it, and which was like the pro-

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missory note received for the cow, that he would not know one writing from the other, as both were written by the prisoner, and that it was after the note was given to him out of the box that he pasted the brown paper on it, as it was getting worn in his pocket.

Thos. Callaghan was then called to corroborate: He stated that he was present at a meeting between the parties subsequent to the date of the note, and at that meeting they were endeavouring to settle the civil bill; that it was then stipulated that Stenson should get his costs and interest, and to give time for payment; that witness was about writing a new note, when the prisoner objected to James Towey signing; that Stenson then said if James did not join he would take no new note, that he had James's note, and would take the law on it unless he signed a new one; that the prisoner Thomas Towey then said, "that he (Thomas) had been 'tested' (b) to come there, but that there was no occasion to test him, that he would prove the note." There was no note produced at this meeting. This witness also proved that he had *tested* the prisoner to appear at the Swinford sessions as a witness, and gave him 1s. 1d., that the prisoner then said there was no occasion to *test* him, that he would go to prove the note.

At the close of the case for the prosecution, counsel for the prisoner insisted that inasmuch as there was but one witness to the assignment of perjury there was no case against the prisoner to go to the jury, and that the learned judge ought to direct an acquittal.

His Lordship declined to do so, but reserved the question whether there was specific evidence of the assignment of perjury in this case to warrant him in leaving this case to the Jury.

The Jury found the prisoner guilty.

*Concannon* (with him *Jordan*), for the prisoner, submitted. In perjury it is necessary that there should be two witnesses, or one witness corroborated. The question, therefore, here will be, was the evidence of the second witness sufficient to corroborate? We submit the corroboration was not to a material fact. The assignment of perjury is, that he falsely swore he did not sign the note; the corroboration, that at a subsequent meeting he said he could prove the note. This latter statement might be consistent with the former, there might be many ways of proving the note without his signing it. The cross-examination of the first witness tended to show that there were two notes, and at the meeting no note was produced; besides, this note might be forged in imitation of the real note originally written by the prisoner, but now lost, and therefore not in his handwriting. And even assuming that they spoke of the same note the corroboration is not to the point upon which the perjury is assigned. The charge is he wrote the note, the second witness only proves that he said he was in a position to fix the maker with legal liability. The old rule of law

(b) Subpoenaed.

as to the necessity of two witnesses has no doubt been greatly relaxed, but relaxed with very considerable care. (*Boulter's case*, 2 Denison's C. C. 402, n.; *Jordan v. Money*, 5 House of Lords, 331-2.) And though this evidence might be sufficient to warrant a jury in finding for the plaintiff in a civil action, yet the law ought to be more strict in criminal proceedings.

The counsel for the Crown were not called on.

LEFROY, C.J.—The rule is now settled and beyond all doubt that corroborative evidence is sufficient to supply the place of a second witness; but the argument urged by the counsel for the prisoner "that the evidence in corroboration must be as full as the evidence of another witness," would bring the old rule round again that there should be two witnesses, as according to their argument the corroborative evidence must equal another witness. The prisoner is the agreed and proper witness to the note, and said he could prove the note; how could he do so except in his character as witness? There is another proposition stated, that which is good and sufficient evidence in a civil case is not so in a criminal. This is not so, the evidence must be the same, it is adduced for the satisfaction of the jury. Here this man was the only witness to the note, and while he is alive is the only witness to prove it; he is alive, and says that he is in a condition to prove it. If he was, does it not amount to his saying this, "I was a witness to prove the note;" and does not that come round to full and sufficient evidence that he was the witness to the note. Therefore, on this ground also, we are all of opinion that the case was properly left to the jury. There was another suggestion, that there was a probability, without any possibility, of the existence of another note: but there was no proof, and we cannot act on a possibility without any positive evidence.

O'BRIEN, J.—In order to lay any foundation for the assignment of the counsel for the prisoner, and to reconcile the statement of the second witness with the prisoner's innocence, we must assume that there was a second note, that is, assume as a fact that which is disproved by the first witness.

HAYES, J.—The question we have to decide is, was the evidence in corroboration sufficient? It is admitted and assumed that evidence of admissions not upon oath made at some other time would be sufficient, therefore the real question is, has sufficient proof of admission been given here? That question has been answered by the jury. What was the meaning of this man when he made those admissions? That was a question for the jury; and they find, first, that he spoke of the document produced; and secondly, that he meant it was in his power to prove that document as a witness. I think that this was a case for the jury, and properly left to them.

The other judges concurred.

*Conviction affirmed.*

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1860.  
—  
Perjury—  
Evidence.

## WESTERN CIRCUIT.

CORNWALL LENT ASSIZES, 1860.

*Bodmin, March 14.*

(Before BARON MARTIN.)

REG. v. SARAH OPIE. (a)

*Concealment of birth—Stat. 9 Geo. 4, c. 31, s. 14.*

*On an indictment against the mother for the concealment of the birth of her illegitimate child, it appeared that the body of the child was found, three days after it was born, behind the door of the privy belonging to the house where she lived as domestic servant, in a tub covered over with a small cloth :*

*Held, that there was no conclusive evidence to warrant the jury in finding a verdict for concealment of birth.*

SARAH OPIE was indicted for the concealment of the birth of her illegitimate child, at St. Austell, November, 1859.

*Stock*, for the prosecution.

*Lyne*, for the defence.

The prisoner was a servant in the family of Mr. Truscott, of St. Austell. On Monday, 7th November, whilst her mistress was out, she was delivered of a child, which she put in the boot-hole on a washing-tray. Here it remained until the following Wednesday, on the morning of which day, another servant in the house saw it, but before he had time to examine it he was called away, and on his return, going to the privy, which is situated directly opposite the boot-hole, he found it behind the door of the privy inside, placed in a tub with a small cloth laid over it.

When the counsel for the prosecution had proceeded thus far with the evidence, MARTIN, B., stopped the case, on the ground that there was not sufficient evidence of the intention on the part of the prisoner to conceal the birth of the child. In referring to *Perry's case* (6 Cox Crim. Cas. 531), the learned judge said that he entirely agreed with POLLOCK, C.B., in dissenting from the opinion expressed by the judges in that case.

*Verdict, not guilty.*

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

## WESTERN CIRCUIT.

CORNWALL SPRING ASSIZES, 1860.

*Bodmin, March 17.*

(Before BARON CHANNELL.)

REG. v. HARRIS.(a)

*Larceny—Possession.*

*Prisoner was indicted for sheep stealing. The prosecutor lost a sheep in September; it was found in the prisoner's possession in March following. There was no other evidence of larceny than the possession. Held, that the period between the loss and the finding was too long to permit the case to go to the jury.*

**P**RISONER was indicted for stealing a sheep.  
*Coleridge*, for the prosecution.

*Stock and E. W. Cox*, for the prisoner.

*Coleridge* stated the facts. The prosecutor lost a sheep in September last. It was not again seen until it was found in the flock of the prisoner, a neighbouring farmer, in the month of March following. There was no evidence of the taking, and the only evidence of guilty knowledge was some contradictory statements made by the prisoner when it was found. Upon this

CHANNELL, B., said: I do not think that upon this evidence I should be justified in sending the case to the jury. The interval of six months between the loss and the finding is too long to require that the prisoner should be called upon to account for it. There is the case of a horse, in which an interval of six months between the losing and finding was held to be too long to put the prisoner upon his defence. I must direct the jury to acquit the prisoner.

*Verdict, Not Guilty.*

(a) Reported by E. W. Cox Esq., Barrister-at-Law.

## WESTERN CIRCUIT.

SOMERSET SPRING ASSIZES, 1860.

*Taunton, March 19.*

(Before BARON MARTIN.)

REG. v. PRATT.(a)

*False pretences.*

*Prisoner contracted with prosecutrix to make a mattress to be stuffed with wool at an agreed price. The mattress was sent, and paid for at the price agreed; but upon opening it shortly afterwards it was discovered that it contained 70lbs. weight of a very different and inferior material called flock, and only 20lbs. weight of wool, Quære, whether an indictable false pretence.*

THE prisoner was indicted for falsely pretending that a certain mattress was stuffed with wool, whereas in truth and in fact it was stuffed with flock, by means of which said false pretence she did unlawfully obtain, &c., with intent, &c.

*Leigh*, for the prosecution.

It was proved on the part of the prosecution that the prisoner contracted with the prosecutrix to make for her a mattress to be stuffed with best wool at an agreed price. The mattress was made and delivered by the prisoner, and paid for at the agreed price. Being found to be hard and knotty in parts, it was opened about two months afterwards, and then it was discovered that, instead of being stuffed with wool as agreed, 70lbs. weight of a very inferior and different material called flock had been substituted.

MARTIN, B., said he felt much doubt whether this was anything more than a breach of contract or of warranty, for which there was a civil remedy.

*Leigh* referred to the cases of *Reg. v. Goss* and *Reg. v. Ragg* (8 Cox Crim. Law Cas. 262), and the cases there cited, in which it had been held by the Court of Criminal Appeal that where a seller represented coal to be of a certain weight, when it was not so, and cheese to be of a certain quality by the manœuvre of

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

passing off tasters as if extracted from the cheese offered for sale, whereas it was not, were indubitable false pretences.

MARTIN, B., said that on the authority of these cases he would send the case to the jury, but he had some doubt whether the present case was anything more than a breach of warranty, and if the prisoner was convicted he should reserve the point for the consideration of the Court of Criminal Appeal.

*Verdict, Not guilty.*

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*False pretences.*

## WESTERN CIRCUIT.

### DEVON SPRING ASSIZES.

*Exeter, March 12, 1860.*

(Before MARTIN and CHANNELL, BB.)

REG. v. DODDRIDGE AND OTHERS. (a).

#### *Night poaching—Assault.*

*Prisoners were indicted for night poaching, and for assaulting a game-keeper with intent.*

*Held, that evidence of the common intent to poach did not sustain the allegation of a common intent to wound.*

*It was proved that prisoners were seen upon the land of the prosecutor at night in pursuit of game. They escaped into a highway and there assaulted the keepers. But the keepers stated that they had not followed the prisoners into the highway with an intention to arrest them there.*

*Held, that there being no intention on the part of the keepers to arrest the prisoners at the time when the attack was made upon them, it was not an assault within the Night Poaching Act.*

**P**RISONERS were indicted for night poaching, and for assaulting the keepers.

*Karslake and Young for the prosecution.*

*Carter for the prisoners.*

It was proved that prisoners were seen by the keepers on the land of the prosecutor, at midnight, armed with guns, near a preserve of pheasants, and shots were heard. On seeing the

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

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keepers the prisoners made off through a plantation into an adjoining highway, where they sat down under a tree. The keepers then came up to them, when the prisoners assaulted and severely wounded them.

In answer to a question by the learned judge, the keepers said that they had not followed the prisoners into the highway with an intention to arrest them.

CHANNELL, B.—This will not sustain the charge of assaulting. The assault must be committed at the time when the keepers are attempting to arrest the prisoners. Here they distinctly swear that they had no intention to arrest the prisoners when they came up to them in the public road. These counts cannot be sustained.

On the trial of another indictment against the same prisoners, before MARTIN, B., for wounding with intent, &c.,

*Karslake* contended that evidence of a common intent to poach would sustain the charge of a joint unlawful wounding, so as to make the act of some of them the act of all.

*Carter*, contra.

MARTIN, B.—I quite agree with my brother Channell, that proof of a common intent to poach, is no evidence whatever of a common intent to wound.

*The jury acquitted the prisoners.*



## CENTRAL CRIMINAL COURT.

*September 17th, 1860.*

(Before Mr. COMMISSIONER KERR.)

REG. v. WOLLEZ AND BLISS. (a)

IN RE SOLOMON ABRAHAM HART.

*Order of Restitution—7 & 8 Geo. 4, c. 29, s. 57—Order made—  
Disobeyed—Rule for an attachment made absolute.**The prisoners, W. and B., were convicted of stealing 159 pieces of plush, the goods of De Gilley. Hart, before the prisoners were convicted, acquired a title to the goods by making an advance of 1,200l. bonâ fide to W., who was the servant and agent of De Gilley, and had established his title to the goods upon an action of trover brought against him for their recovery by De Gilley :**Held, that notwithstanding the title had been acquired under 5 & 6 Vict. c. 39, by Hart, the goods on conviction of the prisoners re-vested in De Gilley, and the Court ordered them to be restored under 7 & 8 Geo. 4, c. 29, s. 57.**This order was not obeyed, and a rule was obtained calling on Hart to show cause why he should not be attached for contempt, and a cross rule was obtained calling upon the prosecutor to show cause why the order of restitution made should not be rescinded.**Rule for an attachment made absolute.***S**LEIGH appeared for the prosecutor, and Metcalfe (Poland with him), for S. A. Hart.*Metcalfe was called upon to support his rule, viz., that calling upon the prosecutor to show cause why the order of restitution should not be rescinded.**Metcalfe.—I must call the attention of the Court to some of the facts proved in this case. De Gilley was carrying on business in Paris and London at the time these goods were pledged with Hart, and Wollez was put forward to the world of London as the agent of De Gilley. He opened all letters, and conducted the business. De Gilley complains that he absconded with the money obtained from Hart, not that he did obtain it. In ordinary cases of larceny*

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

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no doubt upon conviction of the thief, the property in a stolen chattel reverts in the owner: (7 & 8 Geo. 4, c. 29, s. 57.) This is not a case where that statute applies. This is within the 5 & 6 Vict. c. 39, known as the Factor's Act. Sect. 1 of that act says, "that any agent who shall be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so entrusted as aforesaid," &c., and such contract or agreement shall be binding upon and good against the owner of such goods, &c. Mr. Hart has a lien upon these goods; he advanced money to Wollez upon them; it was found by a jury of the Court of Common Pleas to have been an advance made *bonâ fide*. The 6th section of the 5 & 6 Vict. c. 39 enacts, "That if any agent intrusted as aforesaid shall contrary to or without the authority of his principal in that behalf for his own benefit, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or documents of title so entrusted to him as aforesaid, as and by way of a pledge, lien, or security, or shall contrary to or without such authority for his own benefit, and in violation of good faith accept any advance on the faith of any contract or agreement to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, every such agent shall be guilty of a misdemeanour, and being convicted thereof shall be sentenced to transportation," &c. And the 7th section of the act gives the owner a "right to redeem such goods or documents of title pledged as aforesaid at any time before such goods shall have been sold, upon repayment of the amount of the lien thereon," &c. Wollez being the agent of De Gilley, and Hart having made a *bonâ fide* advance upon the goods, De Gilley is left to his remedy under the 5 & 6 Vict. c. 39; and this order of restitution should never have been made.

*Poland.*—In a case of such importance I may address a few words to the Court, and would call attention to the 1st section of 5 & 6 Vict. c. 39, reciting that whereas "under the present state of the law advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only. And whereas advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandise as is given to sales, and that owners entrusting agents with the possession of goods and merchandise, or of documents and titles thereto, should in all cases when such owners by the said recited act (6 Geo. 4, c. 94), or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for advances *bonâ fide* made on the security thereof, &c., &c.

The object of this act is to give an absolute title to a person making an advance *bonâ fide*. Sect. 3 of the act enacts that the act shall be construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malâ fide* in respect thereof against the owner of such goods, &c.

The loss of the goods was intended to be thrown upon the principal who entrusted his agent with the possession of the goods, and not upon the person who in the ordinary course of business and *bonâ fide* made an advance. It was distinctly found by the action of trover that Hart had acted *bonâ fide*, so as to give him a title under 5 & 6 Vict. c. 39, and that being the case the goods did not revert in De Gilley upon conviction of the agent Wollez.

*Sleigh*.—The 5 & 6 Vict. c. 39 does not affect the statute under which this order was made.

Mr. COMMISSIONER KERR.—That is the point in this case.

*Sleigh* proceeded to urge this point, and was stopped by the Commissioner, who at the following session (October) delivered this

## JUDGMENT.

In the August session of this court, two persons, named respectively Wollez and Bliss, were charged, the former with stealing 139 pieces of silk plush, the property of his master, the latter with aiding and abetting the former in so doing. They were convicted and sentenced to two years' imprisonment, with hard labour. It appeared from the evidence at the trial that the prosecutor, Mr. Jules de Gilley, who carried on business in Stamford-street, Blackfriars, had left London to attend on a dying mother; that shortly after he did so, Wollez and Bliss had an interview in Bury-street, St. Mary Axe, on a Monday, with Mr. Solomon Abraham Hart, who carries on business there; the result of which interview was, that Mr. Hart called on the following morning at the place of business of the prosecutor, where he saw the prisoner Wollez, and, in the warehouse, the goods which formed the subject of the charge; that on the morning of the next day the whole of these goods, consisting of 139 pieces of plush, were openly removed in a cart, bearing the name of Mr. Hart, to his premises in St. Mary Axe; and that on the afternoon of that day Mr. Hart gave the prisoner Wollez a cheque of 1,150*l.* in exchange for an invoice, which represented the transaction between them as a sale of the plush by Mr. De Gilley to Mr. Hart for 1,200*l.*, 50*l.* being taken off as discount for cash. Mr. Hart's cheque was duly paid, and Wollez at once absconded with the greater part of the proceeds. He was joined a day or two afterwards by Bliss, and they passed some time together on the continent. Bliss ultimately returned to this country, Wollez travelled to St. Petersburg, where he was arrested, and thence brought back to London. It is not necessary to go into any detail of what took place after the

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flight of Wollez. Mr. De Gilley returned and brought an action against Hart, in which the verdict was for the defendant, his answer throughout being that he had dealt *bonâ fide* with Wollez, who was the recognised agent of the prosecutor, and as such agent had possession of the prosecutor's goods, and authority to dispose of them; in other words, he set up the statute 5 & 6 Vict. c. 39, commonly known as the Factor's and Broker's Act. Wollez being brought back to London in charge of an officer, Bliss, who had been a witness on the trial of the action, and discharged from custody, in order to give his evidence, was again taken; and both prisoners, as has been observed, were ultimately convicted. The prosecutor then applied for an order of restitution under the statute 7 & 8 Geo. 4, c. 29, s. 57. It had been previously arranged by Mr. Sleigh, of counsel for the prosecution, and Mr. Metcalfe, of counsel for Mr. Hart, that the latter should have an opportunity of addressing the Court on this application. Some misapprehension however is alleged to have existed in the minds of Mr. Hart and the solicitor employed by him as to the terms on which the matter should stand over; and Mr. Hart having declined, when required to do so, to give an undertaking to hold the goods till the following session of this court, ready to be then yielded to a writ of restitution, if such writ should be awarded, an order was made directing him to restore them to the prosecutor forthwith. This order not having been obeyed, a rule was obtained by Mr. Sleigh, in the September session of this court, calling on Mr. Hart to show cause why he should not be attached for contempt; and a cross rule at the same time obtained by Mr. Metcalfe calling on the prosecutor to show cause why the order of restitution made during the previous session should not be rescinded. The latter rule was granted, because the Court felt that although Mr. Hart was technically in contempt, his being so might be capable of explanation, and the Court was desirous of affording him an opportunity of stating any cause he had to show why the order of restitution should not be enforced. It may be well to dispose of a somewhat technical objection, rather suggested than urged by Mr. Sleigh to the rule obtained by Mr. Metcalfe, to the effect that an order made at one session of this court cannot be rescinded at a subsequent session. This may well be in the case of a prisoner, the charge against whom has been inquired into, heard, and determined; so that the commission under which the judges exercise their authority having been carried out, nothing remains for them to do—and they are so far *functi officio*—but it cannot well apply to an order made in the exercise of the general jurisdiction of the Court. This however is of little importance, for if the Court is satisfied that an order made at a previous session ought not to have been made, it can at least refrain from enforcing it. By his application Mr. Hart substantially invites the Court to refrain from enforcing the restitution of his goods to the prosecutor, and consequently leave Mr. De Gilley to bring another action. This application is founded on two affidavits, one made by Mr. Hart,

the other by his clerk, Mr. Burunberg; to the former of which is appended a copy of the shorthand writer's note of the summing-up of the Lord Chief Justice of the Common Pleas in the action of trover, in which the prosecutor was plaintiff, and Mr. Hart defendant. It is not necessary however to refer to any of these documents. On behalf of Mr. Hart, it was urged by Mr. Metcalfe: 1. That the 57th section of the 7 & 8 Geo. 4; c. 29, confers a discretion on the Court; that the Court in awarding a writ of restitution, or making an order for the restoration of stolen property, is to act judicially, and not ministerially; and that it ought to leave the prosecutor to his other legal remedies, if any reasonable ground can be urged for doing so. 2. That the transaction by which the 139 pieces of plush came into the possession of Mr. Hart in exchange for a cheque for 1,150*l.*, was in truth and in fact a *loan* or *advance* (that loan or advance being 1,200*l.*, 50*l.* being charged for interest, and the goods being redeemable at the end of the period agreed upon for the sum of 1,200*l.*), and that this loan or advance was *bonâ fide* made in the ordinary course of business to Wollez, who was the *agent* of De Gilley, and whose acts are under the 1st section of the 5 & 6 Vict. c. 39 valid, and therefore binding on the prosecutor Mr. De Gilley. On behalf of the prosecutor it was urged that the Factor's and Broker's Act only rendered valid the acts of "agents" or persons in positions analagous to those of "factors and brokers;" that it did not render valid any wrongful act of a "servant" not an agent; that Wollez was the "servant" of De Gilley in point of fact, and that Mr. Hart could not, and did not deal with Wollez as an "agent" at all, as he did not know of the existence of any "principal," without which the character of "agent" could not exist. It was also submitted that the Court had no discretion in awarding or refusing the writ of restitution. On behalf of Mr. Hart, Mr. Metcalfe confined himself to a reference to the language used by Mr. Justice Pattison in the case of *Scattergood v. Sylvester* (15 Q. B., 511). The 57th section of the 7 & 8 Geo. 4, c. 29, is a re-enactment of the 21 Hen. 8, c. 11. Before that statute there was no restitution of stolen property upon an indictment, the prosecutor being obliged to bring his appeal of robbery, in order to have his goods again. The statute of Hen. 8 gave to the prosecutor in an indictment the same restitution which he could obtain in an appeal, and upon it Sir Edward Coke makes this remark:—"Note these absolute words for restitution upon the evidence given; upon this act there needeth no fresh suit to be inquired of, as we know by experience." Accordingly the observation of Sir Edward Coke, Sir Matthew Hale, Serjeant Hawkins and East, all lead to the conclusion that restitution is to be made or ordered upon conviction, and that the writ of restitution or order of Court is merely a more expeditious method of effecting the object than an action. And in *Horwood v. Smith* (2 T. R. 750), not only the argument but the judgments are all upon the assumption that the prosecutor has a right to restitution in *specie*. In that case indeed it was argued without

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contradiction or even remark, that the Court under the statute of Hen. 8 had no discretion at all in the matter. The 59th section of the 7 & 8 Geo. 4, c. 29, re-enacting the statute of Hen. 8, does not, it is true, award restitution as though the felon had been "attainted at the suit of the party in an appeal;" for the proceeding by appeal had been previously abolished. (b) But this omission cannot alter the meaning to be put upon the section, which must be interpreted according to the ordinary rules of law. And in this view (c) words which may seem at first sight to confer a discretion, but which since the passing of the statute of Hen. 8 have been interpreted as regards that statute, not simply to confer a power on the Court, but to impose on it a duty, to be exercised when a case calling for its exercise arose. If indeed the Court were now called upon for the first time to interpret the statutes either of Hen. 8 or of Geo. 4, it could arrive at no other conclusion than that which has been strictly adopted by the text writers with reference to the former act. The words "*shall have power*" used in both statutes, and which in their ordinary sense are permissive, may be translated "*may*;" and either statute would then read "the Court may award writs of restitution." Had this been the language used, there would have been no room for doubt; for according to the case of *Rex et Reg. v. Burton*, 2 Salk. 209, when a statute directs (the better word would perhaps be authorises), the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall;" a principle of interpretation which seems peculiarly applicable to the case of the owner seeking restoration of stolen property, for the maxim of the law is *spoliatus debet, ante omnia, restitui*; and the effect of which would be to leave the Court no discretion at all, but to award the writ, or make the order of restitution. This is indeed the effect of the 57th section of the 7 & 8 Geo. 4, c. 29; for the rule which is recognised and applied in *Rex et Reg. v. Burton*, is a principle of general application. "When a statute (says Lord C. J. Jervis, delivering the judgment of the Court of Common Pleas in *M'Dougall v. Paterson*, 11 C. B., 775,) confers an "authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application." In this prosecution the case has arisen, the guilty party has been indicted by the owner of the property, and convicted; and it is imperative therefore on the Court to exercise the authority conferred upon it, and to order, and if need be, enforce the restitution of the stolen property. The second proposition urged by Mr. Metcalfe on behalf of Mr. Hart

(b) By the stat. 59 Geo. 3, c. 46, passed shortly after an appellee had waged battle, in *Ashford v. Thornton*, 1 B. & C.

(c) The observation of Sir Edward Coke on the statute of Hen. 8 is strictly applicable, for the words of restitution are the same in both statutes, "*the property shall be restored*." And so are the words which give the Court authority to award writs of restitution, the Court "*shall have power*."

would amount in effect to this, that the Factor's and Broker's Act repeals so far the statute of Geo. 4. But the Factor's and Broker's Act in giving validity to the acts of an agent in certain circumstances, cannot confer on a purchaser a better title *in law* than a sale in market overt. It was not attempted to be disputed by Mr. Metcalfe that if Mr. Hart had bought the prosecutor's goods in market overt, the property therein would have reverted on the conviction. It is impossible that property obtained in any other way should not in like manner revert in the true owner. The rule for an attachment against Mr. Hart will consequently be made absolute; the rule obtained on Mr. Hart's behalf being on the other hand discharged.

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*Rule absolute. (d)*

NOTE.—Stephen, in his "Commentaries on the Laws of England," says, "As to restitution upon conviction, it is observable that it reaches the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in a market overt," a doctrine on which Blackstone remarks that "though it may seem somewhat hard on the buyer, yet the rule of law is that *spoliatus debet, ante omnia, restitui*; especially when he has used all the diligence in his power to convict the felon. And since the case is reduced to this hard necessity, that either the owner or buyer must suffer, the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction."

(d) See the next Case.

## COURT OF QUEEN'S BENCH.

June 2, 1858.

REG. v. PIERCE, BURGESS, AND TESTER. (a)

*Convict felon—Property found in possession of—Power of judge to deal with—Claim of Corporation of London to property of convict felons—Royal Charters.*

*Certain Turkish bonds were found in possession of a prisoner convicted of felony, and it appeared that one-sixth of the value thereof was purchased from the proceeds of the property stolen from the prosecutors and mentioned in the indictment, and the residue of the value thereof was held by the prisoner as trustee for K. The judge made an order directing the bonds to be delivered up to the prosecutors, and empowering them to retain one-sixth of the value, and to settle the residue upon trust for K., in such manner as she might advise. Held, that the order was bad as to so much of the property as was not the subject of the indictment.*

**J** WILDE, on behalf of the Corporation of London, obtained a rule nisi to quash the following order made at the Central Criminal Court.

“Central Criminal Court, to wit.

“The Queen, on the prosecution of the South Eastern Railway Company, against William Pierce, James Burgess and William George Tester.

“Whereas the said William Pierce, James Burgess, and William George Tester, have been at this present sessions convicted of feloniously stealing, taking, and carrying away five hundred pounds in weight of gold, four hundred ounces of other gold, one hundred bars of gold, &c., the property of the said South Eastern Railway Company, the said James Burgess and William George Tester being at the time of the commission of the felony aforesaid servants to the said South Eastern Railway Company. And whereas it has been made to appear to this Court, that certain Turkish bonds of the nominal value of 2,300*l.* now in the hands of Sir Richard Mayne, one of the Commissioners of Police of the Metropolis, by virtue of a certain order of this Court made in the present sessions, were found in the possession or power of the said William Pierce at the time of his apprehension for the felony aforesaid. And it has also been

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



proved to the satisfaction of this Court that one-sixth part of the said Turkish bonds was bought by or for the said William Pierce out of the proceeds of the said felony, and that the said sixth part was in fact so bought with money produced by sale of part of the said goods, chattels, and property so stolen as aforesaid, and that the remaining five-sixths of the said Turkish bonds were, at the time of the apprehension of the said William Pierce for the felony aforesaid, held by the said William Pierce, as trustee for one Fanny Bolan Kay and her child. Now this Court doth order that the said Sir Richard Mayne do forthwith deliver the said Turkish bonds so in his hands as aforesaid, to John Charles Rees, the solicitor of the said Company, and that the said John Charles Rees, and the said South Eastern Railway Company, do upon the receipt thereof retain one-sixth part thereof, to and for the use of the said South Eastern Railway Company, and do forthwith settle the remaining five-sixths parts thereof upon trust for the said Fanny Bolan Kay and her child, in such manner and form as the said Fanny Bolan Kay may advise."

It appeared from the affidavits that the above order was made by Martin, B., and Willes, J., after hearing conflicting claims made on behalf of the Corporation of London and the South Eastern Railway Company.

The Corporation of London claimed to be entitled, by virtue of several charters, to the goods of persons convicted in the city of London of felony committed therein; and upon the conviction of the above prisoners, the Under-Sheriffs, on behalf of the corporation, claimed the property found in their possession, including among other things the Turkish bonds, the subject of the above order.

The South Eastern Railway Company, as the prosecutors, claimed the bonds as being purchased with the proceeds of the property stolen from them.

The following are extracts from the Charters on which the claim of the Corporation of London was founded:—

Charter, 1 Edward 3, March 6, 1327.—"We have granted moreover, for us and our heirs, to the same citizens their heirs and successors aforesaid, that the mayor of the aforesaid city for the time being be one of the justices assigned for the delivery of the gaol of Newgate, and be named in every commission thereof to be made, and that the same citizens may have infangthief and outfangthief, and the chattels of felons, of all those who shall be sentenced before them within the liberty of the aforesaid city, and of all who being of the aforesaid liberty shall be sentenced at the gaol aforesaid."

Charter, 23 Henry 6, October 26, 1493.—"And further of our more abundant favour, we have granted to the citizens aforesaid and their successors, all manner of fines, issues forfeited and to be forfeited, redemptions, forfeitures, pains, and amerciaements, of and concerning all and singular matters, causes, and occasions, and whatsoever trespasses, riots, insurrections, offences,

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misprisions, extortions, usurpations, contempts, and other misdemeanours, committed or to be committed in the city or suburbs aforesaid, before the mayor, recorder and aldermen of the city aforesaid for the time being, the justices of us and our heirs and successors, assigned or to be assigned, to hear and determine felonies, trespasses and misdemeanours, in the city aforesaid or the suburbs thereof, or the justices also assigned or to be assigned to hold pleas before us, our heirs and successors, the justices of the Common Bench, the treasurer and barons of the Exchequer, or other the justices and officers of us, our heirs or successors whatsoever, adjudged or to be adjudged, together with the assessments, levies of the same, when and as often as need be, and the treasure found in the city aforesaid or the suburbs thereof, together with waifs and estrays, for felonies by them committed or to be committed in the city or suburbs aforesaid, adjudged or to be adjudged before us or our heirs or successors, or any of the justices aforesaid; and all merchandise and victuals, which in coming into the aforesaid city to be sold in the same city or the suburbs thereof, and in the water of the Thames, and elsewhere within the same city, liberty, and suburbs, shall be found forestalled, or regrated, and which therefrom and thenceforth shall happen to be forestalled or regrated; and that the same citizens shall have all and whatsoever shall happen to be adjudged by the aforesaid mayor, or justices above said, to be due or appertain to us, or our heirs or successors, of and concerning any recognizances, or securities, made for keeping and observing the peace before them, or any of them, within the aforesaid city or suburbs thereof, and broken and not observed."

2 Edward 4, November 9th, 1462.—"We, therefore, in order henceforth to remove and utterly abolish all and all manner of causes, occasions, and matters whereby the like doubts, opinions, ambiguities, differences, controversies and dissensions can arise, be held, moved or entertained in this behalf, of our special grace and mere motion, have granted to the aforesaid mayor and commonalty and citizens of the city aforesaid, who now are, and to their successors the mayor, and commonalty, and citizens of the same city, who, for the time shall be, for ever the aforesaid town of Southwark with appurtenances, and all chattels called waifs and estrays, and treasure trove in the town aforesaid, and all goods called manopera, and all manner of chattels and goods of traitors, felons, fugitives, outlaws, persons condemned, convicts, and branded felons denying the laws of the land, wheresoever, and before what persons or person soever justice shall be done upon them, and also goods disclaimed, found, or being within the same town, and also all manner of escheats and forfeitures which can belong to us, there as fully and entirely as we should have them if the same town were in our hands, and that it may be quite lawful for the same mayor and commonalty and their successors, by their deputy and ministers of the same town, to put themselves in seizen of and in all goods called manopera, and the goods and chattels of all traitors, felons, fugitives,

outlaws, persons condemned convicts, and branded felons denying the law of the land, and also of and in all goods disclaimed, found, or being within the same town, and also of and in all manner of escheats and forfeitures to us and our heirs there pertaining."

*Petersdorff*, Serjeant, showed cause against the rule. The power of justices of gaol delivery to restore goods stolen to the owner, was conferred by the statute 21 Hen. 8, cap. 11, which enacted, "That if any felon or felons hereafter do rob, or take away any money, goods, or chattels from any one of the King's subjects, from their persons or otherwise, within this realm, and thereof the said felon or felons be indicted, and after arraigned of the same felony and found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed, or owner of the said money, goods or chattels, or by any other, by their procurement, that the party so robbed, or owner shall be restored to his said money, goods, or chattels: and that as well the justices of gaol delivery as other justices afore whom any such felon or felons shall be found guilty, or otherwise attainted by reason of evidence given by the party so robbed, or owner, or by any other by their procurement have power by this present act to award from time to time writs of restitution for the said money, goods and chattels in like manner as though any such felon or felons were attainted at the suit of the party in appeal." This power is extended by the 7 & 8 Geo. 4, c. 29, s. 57, to felonies and misdemeanours, in stealing, taking, obtaining or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever. Under these statutes the judges had power to make the order concerning the property which was the subject of the indictment. And as to that part of the order there can be no objection. The rest of the order may be regarded as a recommendation as to the mode in which the remainder of the property in question should be applied.

Lord CAMPBELL, C.J.—That matter was not referred to them. This is an order made by the justices as justices of gaol delivery; and to the extent to which it may be wrong, this Court must quash it.

*Petersdorff*.—The rule *nisi* is to quash the order generally. If the rule is limited to that part of the property which is not the subject of the indictment, it will not be resisted.

*Wilde*.—The object of the rule is to get rid of that part of the order which is illegal.

PER CURIAM.—The rule will be absolute as to the five-sixths of the property which is not the subject of the indictment. The judges had no power at common law to make that part of the order, and neither the 21 Hen. 8, c. 11, or 7 & 8 Geo. 4, c. 29, s. 57, gave it them.

*Rule absolute accordingly. (b)*

(b) See *Reg. v. Wolles*, and in *Re Hart*, *ante*, p. 337.

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## WESTERN CIRCUIT.

*Bodmin, Aug. 4, 1860.*

(Before Mr. JUSTICE KEATING.)

REG. v. WENMOUTH. (a)

*House-breaking—Attempting to steal—Indictment.*

*An indictment charging that the prisoner feloniously broke and entered a certain dwelling-house with intent feloniously to steal therein, and not with actually stealing, cannot be sustained, the felony created by the statute being entering and stealing.*

*An opening of a door in a shop under the same roof where the prisoner lived as servant, for the purpose of committing a felony, is a breaking and entering within the statute.*

THE prisoner was indicted for feloniously breaking and entering a dwelling-house with intent feloniously to steal therein.

*Prideaux* for the prosecution.

*H. T. Cole* for the defence.

The following were the facts :—The prisoner was a boy in the service of his master, Mr. Clement, who carried on the business of a carpenter and grocer at Antony, in Cornwall. The prisoner was an apprentice in the business of carpenter, and lived in the house. The master, suspecting that he had been in the habit of robbing the till in the grocer's shop, which was detached from the rest of the house, but connected with the passage, and under the same roof, concealed himself in the grocer's shop, having fastened the door with a Bramah latch-lock. About half-past one in the morning, the prisoner burst open the door, and entered the shop for the purpose of taking money from the till, when he was stopped by his master. The master stated that he had no business in the grocer's shop.

*H. T. Cole*, for the prisoner, submitted that as he was domiciled in the house the bursting open of the door by the prisoner under the same roof could not be house-breaking.

*Prideaux*, contra, referred to 1 Hale, 553, and *R. v. Johnson*

in 2 East, P. C. 488, which laid down that the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall or doors or windows of a house; if the thief gets admission into the house by the outer door or window being open, and afterwards breaks or unlocks an inner door, for the purpose of entering one of the rooms, it is burglary; and in 1 Hale, 553, 554, it is said, "so if a servant open his master's chamber-door, or the door of any other chamber not immediately within his trust, with a felonious design, or if any other person lodging in the same house, or in a public inn, open and enter another door with such evil intent, it is burglary."

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KEATING, J.—Even if the prisoner had opened the carpenter's shop, under these circumstances, he should be of opinion that it was house-breaking, and he had no doubt that bursting open the door of the grocer's shop in the manner described was a sufficient breaking.

The jury found the prisoner guilty.

After the verdict,

*Prideaux* stated that he had a doubt, to which he felt it to be his duty to call the attention of the learned judge, as to the sufficiency of the indictment. It was certainly a burglary to break and enter a dwelling-house in the night, with intent to commit a felony; but house-breaking by day was a statutable offence, and the stat. 7 & 8 Geo. 4, c. 29, s. 12, enacted, "that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, and every such offender being convicted thereof, shall suffer death as a felon." Here the indictment, whilst it alleged the breaking to have been felonious, simply charged *an intent* feloniously to steal, and not an actual stealing, and his doubt was whether the offence was more than a misdemeanour, although it was distinctly charged as a felony.

*Cole* said he had not seen the indictment; but if it was as stated by his friend he was of opinion with him that it was bad.

His Lordship having consulted CHANNELL, B., said that his learned brother and himself were agreed that the objection so properly taken by the learned counsel for the prosecution was valid, and that judgment must be arrested.

*Judgment arrested.*

## WESTERN CIRCUIT.

SOMERSET SUMMER ASSIZES, 1860.

*Wells, August 10, 1860.*

(Before Baron CHANNELL.)

REG. v. WATERS. (a)

*Prosecution expenses—Bringing a prisoner from a gaol to be tried in another county.*

*The court has no power to order payment, as part of the expenses of the prosecution, of the costs incurred by the warders of Millbank, in bringing down to Wells a prisoner in custody at Millbank, as an escaped convict, to be tried at Wells on a charge of larceny from the person.*

A man named Waters was convicted of stealing a watch. It appeared that Waters had been sentenced in 1855 to six years' penal servitude, but he had contrived to make his escape from Dartmoor prison, and, after travelling in various places, he at last came to Wells, and there committed this robbery. He was apprehended on the spot, and put in the lock-up at Wells. He, however, escaped from that place, and was afterwards taken in London, and was lodged in Millbank Penitentiary. As the parties at Wells were bound over to prosecute for the stealing of the watch, the attorney for the prosecution issued a writ of *habeas corpus* and sent it to Millbank, in order that the prisoner might be brought to Wells. In consequence of the writ, two warders brought the prisoner heavily ironed to Wells. When tried, he was still in irons, as Mr. Oakley, the governor of the Somerset Gaol, did not deem it safe to take them off, as he had escaped from four gaols, and had said he could escape from any gaol in England. He was convicted, and sentenced to ten years' penal servitude. After the prisoner's conviction, an application was made to Mr. Gurney, the clerk of assize, to allow the expenses incurred by the warders in bringing the prisoner from Millbank to Wells, but

(a) Reported by E. W. Cox Esq., Barrister-at-Law.

Mr. Gurney was of opinion that he had no power to allow such expenses.

*Kingdon* now applied to the judge for an order for the expenses, which amounted to 6*l*. The statute enacted that the expenses of the prosecutor and witnesses, and other expenses incurred in the prosecution, should be allowed; he therefore submitted that if the prisoner had not been brought to Wells the prosecution could not have proceeded, and therefore these expenses must have been contemplated by the act.

CHANNELL, B.—I do not think that I have power to make the order. The governor of Millbank was a public officer, and was bound to have produced the prisoner.

Mr. GURNEY stated that a somewhat similar question had arisen some time since before Chief Justice Erle, when a claim was made for the expense of apprehending a prisoner, and that learned judge decided that the expense of the apprehension could not be allowed.

His Lordship, having consulted Mr. Justice Keating, stated that he had not power to make the order.

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## Ireland.

February 4, 1860

(Before PIGOT, C.B., O'BRIEN and HAYES, JJ., GREENE, FITZGERALD and HUGHES, BB.).

IN RE HUNTER. (a)

*Presentment—Grand Jury Act, 6 & 7 Will. 4, c. 116, s. 135.**In a presentment for maliciously killing sheep, the words "made away with," were added to the words mentioned in the act.**Held, that these words "made away with" were surplusage, and did not vitiate the presentment.*

THIS case came before the Court for the opinion of the judges on the statement of Mr. Justice Perrin, in which the circumstances are fully detailed as follows:—In this case a sum of 62l. 15s. had been presented at presentment sessions, and subsequently by the grand jury at these assizes, to William Hunter, for loss and damage sustained by him by reason of thirty-five black faced sheep, his property, which were grazing on the lands of Alton and Ballyness, having been maliciously, killed, maimed, injured, destroyed, and made away with on or about the night of the 10th of Feb., 1859. There were two further presentments in similar terms, one for 165 sheep, and the other for 88 sheep, to the same person. On these presentments coming before me, Mr. Dowse, for certain ratepayers, objected to my fiatting them on the ground that under the 135th section of the Grand Jury Act (6 & 7 Will 4, c. 116), presentments for malicious injury to animals are confined in terms to cases in which they are either killed, houghed, maimed, or injured maliciously, and that the introduction of the words "made away with" under which evidence might be given of a cause of complaint different from any of those expressed in the statute, vitiated the presentment, and that it was consistent with the words "made away with" that the sheep had been

(a) We are indebted to *The Irish Jurist* for a report of this case.



feloniously stolen or carried off the lands alive. In either of which cases he contended that the clause did not apply. Mr. Hamilton, for the claimant, argued that those words were merely cumulative or synonymous with the word "killed" and, therefore, surplusage not vitiating the presentment. I, therefore, reserved for the consideration of your lordships the question whether the introduction of the words "made away with" renders the presentment bad. Suspending my fiat to await the event of your decision. The above presentment and the two others also referred to are to be fiatd or not according to the decision in this case.

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(Signed)

LOUIS PERRIN.

*O'Hagan*, Serjt., Q.C. (with him *Dowse*, R.), appeared on behalf of the cesspayers who objected to the form of the presentment. The section enabling a person to claim compensation for malicious injury, &c., is the 135th section of the Irish Grand Jury Act (6 & 7 Will. 4, c. 116). The words of the section important are, "And be it enacted that, from and after the commencement of this act, in all cases of maliciously or wantonly setting fire to, &c., or of maliciously killing, maiming, houghing, or injuring any horse, mule, ass, or swine, or any horned cattle or sheep, or of maliciously &c., &c." And we contend that it would be competent, under the words "made away with" added to this presentment after the word injured, for the party to make a case not within the contemplation of this act, and would enable them to give evidence not otherwise admissible, and not intended to be admissible at the presentment sessions, by which they might show that some sheep were "killed," some "made away with," feloniously or otherwise, and to obtain compensation for all under this presentment. This act being in one sense remedial, in another penal, ought to be dealt with very strictly by a court of law. It is also a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. And in an Act of Parliament which imposes any duty or burden on the public when there is any ambiguity found the construction must be in favour of the public: (*Dwarris on Stat.*, 646.) [*FITZGERALD*, B.—If there was any doubt of the fact that these sheep were not maliciously destroyed, you ought to have brought that fact before a jury. The judge at the assizes would have investigated it anew. By your not having done so, we must take the fact as admitted.] This presentment is bad on the face of it, and it is competent for my clients to make this objection. *In the matter of Thos. Roe* (*Smith & Batty*, 97) a petition for compensation under the Whiteboy Act (15 & 16 Geo. 3, c. 21, s. 8) was dismissed, *Jebb*, J., saying, "that the petition ought to state that the persons were armed, or that the country was disturbed." *In re Newton* (*Irish Cr. Ca.*, 554) a presentment founded on an application to the presentment sessions which omits the sections of the act authorising the presentment cannot be fiatd. *In re Forth*

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(2 *Craw. & Dix.*, 469). [Counsel also referred to 29 Geo. 2, c. 12; 19 & 20 Geo. 3, c. 37; and *re Blake* (Jebb's Crim. Cas. 71); also the English Act 7 & 8 Geo. 4, c. 30, s. 16; also the cases of *Smith v. Bolton* (Holt's Rep. 201); *Beckwith v. Wood* (1 Barn. Al., 487), decided under the English act, consolidating the laws relative to remedies against the hundred (7 & 8 Geo. 4, c. 31), and as to particular felony being committed for individual benefit.]

*Brook, J.*, Q.C. (with him *Hamilton, J. P.*), contra, was not called on.

*R. Dowse* submitted that a presentment passed before a petty sessions should be considered as a conviction, and be good throughout, and cited *R. v. Catherall*, (2 Str., 900, 1 T. R. 269), Paley on Conv., 143; *Gosset v. Howard*, (10 Q.B., 411); also that the words should not be carried further than the natural sense. *R. v. Whistler* (Holt., 215); *Burrows v. Wright* (1 East, 617); *Roscoe N.P.*, 2 ed., 773. Malice, in the legal acceptance of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another, *Ferguson v. Earl of Kinnoull* (9 C. F., 321), and therefore the words "maliciously made away with," do not mean a making away with through personal spite, but may mean stealing.

*FIGOT, C.B.*—We are all of opinion that this objection under the circumstances presented to us must fail. The form of this presentment, however is, in my opinion, objectionable, and if brought before me at assizes, and claimant had succeeded, I would refuse him his costs, and for this reason, that I think these words "made away with" might allow illegal proof. If judge of assizes to allow the question to be tried by a traverse so as to ascertain whether such illegal evidence had been admitted, and that he had no power to obtain the opinion of a jury, then I might differ from my present opinion. But in this case we must consider ourselves in the place of the judge, and, considering the circumstances, say, "if you object that illegal evidence may have been admitted, I will now allow you to try that question in a traverse," and if there was this opportunity to take such traverse before the judge and those who took this objection passed it by, we ought to consider that he was not in a position to show that the entire evidence admitted was not applicable to the offence contemplated by the exact words of the statute. In *Jackson v. Pesched* (1 Maul. & Selwyns) Lord Ellenborough says, as to a matter essentially necessary to be proved, and whereas declaration contains terms sufficiently general to comprehend it in fair, reasonable intentment, so as to be cured by verdict. "Where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict, that it was so restrained at the trial." We must, therefore, now assume that the evidence was applicable to that portion of the presentment within the terms of the act, and apply the maxim *utile per inutile*

*non vitiat*, and consider these words "made away with" mere surplusage. On the other hand, if not they would have a consistency, as we must consider from no traverse being taken that the evidence given was only applicable to those words contained in the act. We therefore consider this presentment good and valid.

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GREENE, B.—I think the simple question is, whether or not this presentment is void on the face of it? It is drawn in accordance with the act, except as to the words "made away with," would the addition of these words make the whole fall? I think not. I think this clearly comes within the maxim, *utile per non vitiat*.

*Objection overruled.*

## COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1860.

(Before COCKBURN, C.J., HILL and BLACKBURN, J.J.)

EX PARTE CRAWSHAY v. LANGLEY.

*Criminal Information—Foreign Enlistment Act.*

*This Court will not grant a criminal information for breach of a public statute creating a state offence on the application of a private person, but only on the information of the law officers of the Crown.*

*If a private person desires to punish an infraction of such a statute he must do so by the ordinary machinery for the administration of justice, the preferring of an indictment.*

*The Foreign Enlistment Act creates an offence against the state, and the Court refused a rule for a criminal information for breach of it on the application of a private person without the sanction of the Attorney-General.*

BOVILL, Q.C. (*Couch with him*), said: I am instructed on behalf of Mr. Crawshay, magistrate of Newcastle-upon-Tyne, and lately Mayor of the borough of Gateshead, for a rule *nisi*, calling upon Mr. John Baxter Langley to show cause why a criminal information should not be exhibited against him for a certain misdemeanour committed by him against the Foreign Enlistment Act, and the common law of the land. Mr. Langley is the proprietor and publisher of the *Daily Chronicle and Northern Counties Advertiser*, at Newcastle, and also of a weekly paper, called the *Newcastle Chronicle and Midland Counties Advertiser*, and this application is made with reference to certain articles published by him, which I have to submit to the Court are endeavours on the part of Mr. Langley to procure persons in England to serve in the army of Garibaldi, and also acts done for the purpose of inciting persons to enter into the service of that general. Before I call attention to the circumstances under which Mr. Crawshay feels it to be his duty to bring the matter before the Court, I think it right personally to express that I have no other feeling than the deepest sympathy for the Italian people, the greatest admiration for the leader who has restored them to freedom and independence, and who probably has conferred on the Italian people the greatest benefits, and on the cause of freedom throughout the world.

COCKBURN, C.J.—Is it in Mr. Crawshay's character of mayor that you make this application?

*Bovill.*—No.

COCKBURN, C.J.—Is this the case of a private individual coming forward to institute proceedings for an offence against the State? Is there any precedent for such an application?

HILL, J.—I know of no such precedents.

COCKBURN, C.J.—This is an act against the State, and if there is any offence in it it is for the Attorney-General, as the representative of Her Majesty, to set matters straight. I never heard of a private individual coming forward and complaining of such conduct.

BLACKBURN, J.—Is there an instance on record where the law has been put in force, as now asked, in cases in which the applicant has no personal interest?

*Bovill.*—I am not sure that there is.

COCKBURN, C.J.—And I should be sorry to establish such a precedent.

*Bovill.*—The matter has been brought before the magistrates at Newcastle, who declined to act, and Mr. Crawshay has no other remedy than to apply to this Court.

HILL, J.—By taking out a summons at chambers, Mr. Crawshay can have powers to prefer an indictment. There is no pretence for asking for this great criminal interposition.

*Bovill.*—The matter is one of deep interest. Supposing the magistrates have laid down the law contrary to what it really is, or have entirely mistaken the view of it, or have produced an impression of the law contrary to what ought to exist in this country?

COCKBURN, C.J.—Then the proper course is to obtain leave to prefer an indictment. You are now asking this Court to interpose summarily with a criminal information against the defendant, for which, so far as I am aware, there is no precedent.

*Bovill.*—Except this, that in a matter of great importance affecting the whole country it seems right that this, the highest court of criminal jurisdiction, should entertain the question.

HILL, J.—We must have it brought before us by the proper authority, the Attorney-General. You are asking us to sanction a private individual taking up a matter of state in which probably the Attorney-General does not think it right to interfere. We cannot do it.

*Bovill.*—Supposing a matter of great public importance is brought before the magistrates of a particular district, and they have decided upon the point in a manner subversive of the national, common, and statute law, and an impression prevails, in consequence of the reports that the parties have circulated throughout the country, that illegal acts may be done with impunity?

BLACKBURN, J.—In your position this I will assume, that the person against whom you are moving is guilty of a misdemeanour, and, further, that the magistrates have not discharged their duty

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in not having committed the party on the materials before them, or have bound him over to take his trial, is that any reason why the high prerogative process of this Court should be granted in this, the case of a private relator, who has no personal interest in it.  
*Bovill.*—That is in the discretion of the Court.

*BLACKBURN, J.*—Has ever anything like it been done in this Court? I know of nothing bearing the slightest resemblance to it.

*Bovill.*—I cannot say. In a matter affecting the public peace, all have an interest in preserving it, and it is a question how far a private individual is at liberty to set the law in motion.

*BLACKBURN, J.*—We do not take upon ourselves to express any speculation with respect to the necessity of public prosecutions; but this I make bold to say, that, in a matter of an offence against the State, the proper officer to prosecute is the Attorney-General; and, if he had applied in it it would have been a different matter; but for a private individual to come forward and take upon himself the functions of the law officers of the Crown, this Court in its discretion cannot sanction it.

*Bovill.*—The question involved is whether the rule now absolutely laid down does not involve the Government and the law officers of the Crown in greater responsibility than ought to be cast upon them.

*BLACKBURN, J.*—I cannot help thinking that the volunteer principle had better be confined to the excellent limits we have seen so much of in recent times. We don't want volunteer attorneys-general.

*HILL, J.*—On referring I find I made a mistake just now. The applicant may prefer a bill of indictment without a judge's order.

*Bovill.*—That is true. But my client has been openly challenged by the magistrates to bring their decision under review, and, it being a matter of great public interest, he has thought it desirable to make this application. These circumstances are upon affidavits, and I am instructed to submit this application to the Court. I have no precedents to show for this application; but I submit that this is such a peculiar case, and the circumstances surrounding it such as to ask for the intervention of this Court. Mr. Crawshay has resorted to the ordinary tribunals, and the magistrates of Newcastle have decided against him upon what they understand to be the law and the construction of the Act of Parliament. It is a matter of public notoriety and comment, and the applicant has been challenged to bring it before the Court. I will, with your lordships' permission, state the facts of the case.

*BLACKBURN, J.*—You must take your own course. I don't think it would alter the view we take of the matter—that of a private individual availing himself of a criminal information in a matter affecting the public weal. There is no precedent for such an interference of the Court. We know nothing sanctioning it. The officer of the Court knows of no such a case before, and I think we must not sanction the application.

*Bovill.*—Assuming that I can make out a case of violation of

the law, I understand your lordships will still be of opinion that it is not a matter for a private individual to bring forward.

COCKBURN, C.J.—We think it is a case in which the court ought not to grant a criminal information, but leave the applicant to proceed by the ordinary course of law by preferring an indictment.

*Bovill*.—After that information from the bench and the authority of the officer of the court as to precedents, it will not be becoming in me to go into the facts of the case. It is a preliminary objection that strikes at the root of the application. I was prepared with facts to show that the defendant's conduct was illegal, and that it involved most serious consequences to individuals. The volunteers are liable to be treated as rebels, and if proved to have killed a Neapolitan would be guilty of murder, and liable to the penalties of the law.

COCKBURN, C.J.—If Mr. Crawshay is anxious for the public service to bring the matter under the attention of Her Majesty's law officers, and if they think it necessary for their intervention, no doubt the right course will be pursued by them.

*Application refused.*

EX PARTE  
CRAWSHAY  
v.  
LANGLEY.

1860.

*Criminal  
information.*

## CENTRAL CRIMINAL COURT.

October 23rd, 1860.

(Before POLLOCK, C.B., MARTIN, B., and HILL, J.)

REG. v. DAVISON. (a)

*Discharge of jury at a former trial no bar to a second trial, although the cause of discharge of jury does not appear upon the record, and they were not discharged from any real necessity.*

*Prisoner, W. D., was indicted for an indecent assault upon A. D. Upon his trial at the Middlesex Sessions, before Mr. Payne, Deputy-Assistant Judge, the jury, not being able to agree upon their verdict, were, after being locked up five hours, discharged from giving a verdict, the prisoner being admitted to bail to appear and take his trial at the next session ensuing. In the meantime a writ of certiorari was lodged, and the prisoner surrendered to take his trial at the Central Criminal Court. It was objected, upon his arraignment there, that the prisoner could not be tried again, the judge having discharged the jury from giving their verdict of his own caprice, and not from any illness of any of the jurors, or any real necessity having arisen for their discharge. It was further objected that upon a jury being discharged the cause for such discharge should appear upon the record, and that this record was in that particular defective.*

*Held, that the judge presiding at the trial was sole judge as to whether a necessity for such a proceeding as discharging the jury had arisen, that a discretionary power was vested in him, that he must exercise his discretion, and that there was no appeal to any other tribunal as to whether in exercising that discretion he had done so rightly.*

**F.** H. LEWIS, for the prosecutor. *Sleigh* (*Best* with him), for the prisoner.

Upon being arraigned the prisoner pleaded *Not Guilty*, and *Sleigh* then tendered a further plea, in the form and manner following:—

## PLEA.

“And the said William Davison, in his own proper person, cometh into court here, and having heard the said indictment read

(a) Reported by R. ORRIDGE, Esq., Barrister-at-Law.



saith, that our sovereign Lady the Queen ought not further to prosecute the said indictment against the said William Davison, because he saith that heretofore, to wit, at the Adjourned General Sessions of the Peace, holden at Westminster, in and for the County of Middlesex, before William Henry Bodkin, Esquire, and Joseph Payne, Esquire, and others being Justices of the Peace for the said county, being then and there duly assigned to hold the Adjourned General Sessions of the Peace in and for the said County of Middlesex, a jury of twelve good and lawful men were then and there duly empannelled and sworn to try the issue above knit or joined between our sovereign Lady the Queen and the said William Davison. And the jurors so sworn and empannelled were then and there duly charged with the said William Davison, who was then and there duly given in charge to the said jury so sworn and empannelled as last aforesaid; and the said William Davison was then and there duly given in charge to the said jury; and Arthur Grey Maude did then and there produce divers, to wit, four witnesses for and on behalf of our said Lady the Queen, who were then and there duly sworn, and who then and there gave evidence to the said court and to the said jury so sworn and empannelled and charged with the said William Davison, touching the said supposed misdemeanour. And the said William Davison further says that the said jurors so sworn and empannelled were charged with the said William Davison touching the said supposed misdemeanour. And the said William Davison further says, that the said jurors so sworn and empannelled as last aforesaid, were then and there, and after they were so charged with the said William Davison as last aforesaid, discharged of him the said William Davison not by reason of any fatality, or misconduct, or request of him, the said William Davison, or for or by reason of any fatality or evident necessity of them the said jurors so sworn and empannelled as aforesaid, or of any of them, or of or by reason of any accident or physical or mental infirmity or illness of them the said jurors so sworn and empannelled as last aforesaid, or any of them, or of the said Justices of the Peace aforesaid or of either of them, or of or by reason of any other sufficiently or legal cause whatever; and notwithstanding that the said William Davison did then and there, by William Campbell Sleigh, and John Best, of counsel for him the said William Davison, object and urge before the said William Henry Bodkin, Esquire, and Joseph Payne, Esquire, and others being Justices of the Peace for the said county, that such discharge of the said jury was unnecessary and would be illegal, and notwithstanding the non-consent of the said William Davison in that behalf. And this the said William Davison is ready to verify, the wherefore he prays judgment, and that he may be dismissed by the Court here from the premises of the said indictment mentioned, and that the same may not be further prosecuted against him the said William Davison.

(Signed)

"W. CAMPBELL SLEIGH,  
"JOHN BEST."

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v.  
DAVISON.  
—  
1860.  
—  
*Discharge of  
jury.*

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v.  
DAVISON.

1860.  
Discharge of  
jury.

To this plea, *F. H. Lewis*, replied :—

REPLICATION.

“And hereupon Henry Avory, Clerk of the said Central Criminal Court, who prosecutes for our said Lady the Queen in this behalf, says that by reason of anything in the said plea of the said William Davison above pleaded in bar alleged, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said William Davison, because he says that the said jurors so empannelled, sworn, and charged as aforesaid were sent to and remained in the jury room for a long space of time deliberating upon their verdict, and the said jurors after the lapse of the said long space of time came into court and said that they had not agreed upon their verdict, and that they were not likely to agree upon their said verdict, whereupon all the other business before the said justices having come to a conclusion, the said justices then and there examined into the premises, and in the exercise of their discretion and in pursuance of law discharged the said jurors from giving a verdict.

“FREDERIC H. LEWIS.”

*Sleigh* then objected that the replication was no answer to the plea as it did not set forth that the jury were discharged by reason of any evident necessity, nor did it appear upon the face of the record that they were discharged by reason of any infirmity or illness.

The record, which was then produced and handed to their lordships, commenced in the usual form, and then stated as follows :—  
“At which said General Session of the Peace of our said Lady, &c., holden, &c., comes the said William Davison in his own proper person, and having heard the said indictment read, and being asked of the premises above laid to his charge, how he would acquit himself thereof, he saith thereof that he is not guilty of the premises therein laid to his charge, or any or either of them, or any part thereof, and concerning thereof he puts himself upon the country, and C. A. H. Ellis, Esq., the Clerk of the Peace for the county aforesaid, who prosecutes for our said Lady the Queen, in that behalf doth the like. Therefore let a jury, &c., and the jurors, &c., being called, come and are chosen, tried and sworn to speak the truth of and upon the premises in the indictment aforesaid above specified. And afterwards, to wit, on the day and in the year last aforesaid, the jurors last aforesaid, as sworn as aforesaid, having been kept together for the space of five hours, namely, from the hour of ten in the morning till three in the afternoon, without meat or drink, retire from the bar to consult upon their verdict to be given upon the premises in the said indictment mentioned, and afterwards and after the further space of two hours, that is to say, at five o'clock in the afternoon, all the other business of the said last mentioned General Sessions having been previously disposed of and completed they return to the bar here, and being asked by the Court here whether they the said jurors have agreed

upon their verdict, they say that they have not agreed, and unanimously declare that they are not likely to be able to agree upon any verdict to be given by them in the premises aforesaid. And the jurors last aforesaid hereupon again retire from the bar to consult upon their verdict to be given upon the premises in the said indictment mentioned, and afterwards and after the further space of four hours, that is to say, at nine o'clock at night, they return to the bar here, and being asked by the court here, whether they the said jurors have agreed upon their verdict, they say that they have not agreed, and again unanimously declare that there is not the slightest chance of their being able to agree, and that they are as far off from agreeing as they were when they first retired as aforesaid, and because it manifestly appears to the Court here that the jurors last aforesaid have not agreed, and that there is not the slightest chance of their being able to agree to any verdict in the premises aforesaid, and for divers other good causes moving the Court here in that behalf, the Court here in the exercise of its discretionary power and authority, and in due course of law, doth altogether discharge the said last mentioned jurors from giving any verdict upon the premises and they are discharged from giving any verdict herein accordingly, notwithstanding the counsel for the said William Davison objects thereto, &c. &c.

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v.  
DAVISON.  
—  
1860  
—  
Discharge of  
jury.

*Sleigh* cited the following authorities in support of the proposition that a judge can only discharge a jury from some real necessity and not of his own caprice, also that upon a jury being discharged the cause of such discharge should appear upon the record: 1st and 3rd Coke's Institutes; vol. 4 of Stephen's Commentaries; *Reg. v. Harvey*, State Trials, 414; *Reg. v. Conway and Lynch* (1 Cox Crim. Cas. 210), and *Reg. v. C. Newton* (13 Q. B. 716).

*Lewis* was not called upon.

**POLLOCK, C.B.**—Mr. *Sleigh's* argument is chiefly founded upon the case of *Conway v. Lynch*, but there the prisoner was indicted for a capital offence, here the indictment is for a misdemeanour. There being that wide difference in the cases I do not feel called upon to express an opinion upon that case. The judge has a discretionary power and he has exercised that power, and the discharge of the jury upon the former occasion is not to prevent his being again put upon his trial.

**MARTIN, B.**—I might have acted upon the case of *Conway v. Lynch* if this case had been similar to that, but it is distinguished from it in being a misdemeanour and not a felony. A judge must have a discretion in many things, and those who appoint judges ought to take care to appoint judges upon whose discretion reliance can be placed. If Mr. *Sleigh's* argument be correct, the grounds of discharge must be stated, and is it to be tried by a jury or by a court of appeal whether a judge was actuated by the motives stated? It is a matter where a judge is bound to exercise his judicial opinion, he is sole arbiter, and against the exercise of that opinion there is no appeal. In the case of *The Queen v. M. C. Newton* it was alleged that the prisoner was given in charge

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Discharge of  
jury.

to a jury at the assizes, and the jury were improperly discharged; and therefore it was contended the prisoner must be set at liberty. Lord Denman then said "I do not think that conclusion follows either logically or on the legal authorities. Even assuming that the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, nor how it could be made the subject of a plea." I think the plea is bad.

HILL, J.—I am of the same opinion. I consider the law to be that the presiding judge at the trial is the sole judge whether such a case of necessity has arisen as to justify him in taking such a step as discharging the jury. Having exercised his discretion in the matter there is no appeal to any other tribunal, as to whether that discretion has been rightly exercised. It may be that such a state of circumstances has arisen that it is utterly impossible a verdict can be given; he may then exercise his power. In my opinion the judgment of Mr. Justice Crampton in *Conway v. Lynch* (b) fully expresses the law upon the point.

The trial then proceeded,

*Verdict, Not Guilty.*

Mr. Justice Crampton concludes a very lengthy judgment in these words:—"After a public declaration in open court by the jury that they could not agree to any verdict, and in the exhausted and enfeebled state in which they must have appeared on the second day before the judge, he was well warranted in considering that 'the jury could in nowise agree,' and a case of evident necessity for their discharge had arisen. But, whether or not this case of evident necessity sufficiently appears upon this record, I rest not on; on that point I think the presiding judge alone was competent to decide. He has decided it, and this Court has no power to review his decision in that respect. The pleas in the present case therefore, which are founded on the notion that the judge had no such discretionary power, are, in my mind untenable; and even if there was an improper exercise of his discretion by the judge (and I am far from saying that there was), yet the exercise of that discretion cannot amount to error in law; nor can an abortive trial, without a verdict, be pleaded (as a defence) on the same footing with an acquittal by verdict. I am of opinion that there should be judgment for the crown."

The other judges differing from Mr. Justice Crampton, judgment was given against the Crown.

(b) In *Conway and Lynch, v. The Queen*, Easter Term, 1845, Queen's Bench (Ireland), reported, 1 Cox Crim. Cas. 210.

## NORFOLK CIRCUIT.

## SUFFOLK LENT ASSIZES.

*Bury St. Edmunds, March 23rd, 1860.*

(Before Lord Chief Justice COOKBURN,)

REG. v. CHIDLEY AND CUMMINS. (a)

*For feloniously and maliciously wounding, &c.*

*Deposition of witness taken before magistrates allowed to be read at trial as evidence against him, although after his evidence was taken the magistrates committed him for trial, his evidence criminating himself.*

**H.** CHIDLEY and Edward Cummins were indicted for feloniously and maliciously wounding Robert Pigg, at the parish of St. Mary Towers, Ipswich, on the 18th of February, 1860.

*Henry Mills*, for the prosecution.

*Bulwer*, for the defence.

At the examination before the magistrates the prisoner Chidley alone was charged with having committed the offence for which they were now jointly indicted. The prisoner Cummins came forward voluntarily and gave evidence exculpating Chidley, and confessed that he had inflicted the injuries upon the prosecutor. Upon this he and Chidley were both committed for trial.

*Mills* now proposed to put in the prisoner Cummins's deposition.

*Bulwer* objected on the ground that he could not have been compelled to make that statement, it criminating himself, and it was made by him voluntarily.

COCKBURN, C.J., ruled that the deposition was admissible.

*Verdict, Cummins, Guilty.*

*Chidley, Not Guilty.*

(a) Reported by R. ORRIDGE Esq., Barrister-at-Law.

## OXFORD CIRCUIT.

## GLOUCESTER SUMMER ASSIZES.

*Gloucester, August, 1860.*

(Before Mr. JUSTICE HILL.)

REG. v. THE INHABITANTS OF LANGLEY.

*Practice—Highway—Plea—Retracting plea—Costs.*

*Where the defendants retract their plea of "not guilty" and plead "guilty," the Court has no power to order the costs of the prosecutor, under sect. 95 of the Highways Act (5 & 6 Will. 4, c. 50), which directs such costs to be ordered by the Judges of Assize before whom such indictment is "tried."*

*Where the inhabitants of the parish are indicted for non-repair of a highway, and appear and plead not guilty by two surveyors, it is not competent to one of such surveyors only to appear and retract the plea of "not guilty" and plead "guilty;" the other appearing only and pleading by the clerk of his attorney.*

**I**NDICTMENT for non-repair of a highway.

Plea—"Not guilty."

*Pigott, Serjt., and Powell, J. J., for the prosecution.*

*Huddleston, Q.C., for the defendants.*

*Huddleston* said that defendants had pleaded "not guilty" at the last Assizes. They now desired to retract their plea and plead "guilty."

*Pigott, Serjt.,* said the indictment had been preferred by direction of justices, and he applied for the costs of the prosecution under the 95th section of the Highway Act (5 & 6 Will. 4, c. 50), which enacted that the costs of such proceedings should be directed by the judge of assize before whom the said indictment is "tried," to be paid out of the highway rate.

*Huddleston* opposed the application, on the ground that there had been no trial. In a similar case, at the Herefordshire Spring Assizes, in 1846, where the defendant had pleaded "not guilty," and then retracted his plea and pleaded "guilty," Baron Platt, after consulting Mr. Justice Williams, held that, as the indictment

had not been "tried" before him, the prosecutor was not entitled to his costs. (*Reg. v. The Inhabitants of Vouchard*, 5 C. & K. 393.)

HILL, J., after consulting BYLES, J., said he felt bound by the authority cited, and refused the application.

*Pigott*, Serjt., said that the defendants had given the prosecutor notice of trial, and the prosecutor and his witnesses had been kept waiting in Gloucester all the assizes until the last day. If a plea of "guilty" had not been recorded he should have asked the learned judge not to grant the application to retract the plea, as that had the effect of depriving the prosecutor of the costs to which he was entitled.

At a subsequent period of the day, it was ascertained that only one of the two defendants, the surveyors of the highway, who had been admitted to represent the parish generally, had pleaded "guilty" in person. The other defendant had not appeared in person, but the clerk of his attorney had appeared and pleaded in his stead.

HILL, J., upon this, said the plea of "not guilty" pleaded at the last assizes had not been properly withdrawn, and therefore the trial must proceed, as he should not now give leave to the defendants to withdraw their plea and plead "guilty."

The counsel who had been retained by the defendants having left the assizes,

*Cooke Evans* was instructed to contend that the plea of "guilty," as entered, was well pleaded. It was not necessary in a misdemeanour of this nature that a defendant should appear personally to plead to the indictment; but he contended it was sufficient if he appeared and pleaded by his attorney.

HILL, J., said that the two surveyors jointly represented the parish, and, as they did not both appear and plead "guilty," the plea of "not guilty" stood, and the trial must proceed.

*Cooke Evans* then applied to have the trial adjourned to the next assizes.

HILL, J., refused the application, but said he would adjourn the trial till the morning.

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v.  
INHABITANTS  
OF LANGLEY.  
1860.  
Retracting  
plea—Costs  
—Highways.

## MIDLAND CIRCUIT.

## DERBYSHIRE SPRING ASSIZES.

*Derby, March 19, 1860.*

(Before Mr. Justice WILLES.)

REG. v. GARRETT.

*Fraudulent Trustees Act, sect. 4.**The acting treasurer of a charity misappropriated monies of the charity received by him as such. Being indicted for larceny as a bailee, under sect. 4, of 20 & 21 Vict. c. 54, it was**Held, that the money was not held by him as bailee, for he was not bound to pay over the specific coins; and that it was not larceny, the first possession being lawful.*

THE prisoner was indicted under the Fraudulent Trustees Act, 20 & 21 Vict. c. 54, s. 4, for that, being a bailee, he took and converted to his own use the sum of 18*l.* 3*s.* 9*d.* the property of George Butt.

A second count charged a larceny of the same sum.

*Boden* for the prosecution.

*F. Stephen* for the prisoner.

The facts were as follow :—

The prisoner was a curate, officiating for the Rev. Mr. Butt, vicar of Chesterfield. The sum of 18*l.* 3*s.* 9*d.*, collected in the parish church of Chesterfield for the benefit of the Church Missionary Society, was handed by the churchwardens to the Rev. Mr. Butt, and paid by him into his own bank at Chesterfield; but in consequence of a conversation with the prisoner, in which the latter advised that it would be better, since the money was bearing no interest in the bank where it lay, to withdraw it and place it in the savings-bank, where interest would be paid at the rate of 2½ per cent., the prisoner stated that he would place it in the savings-bank, and Mr. Butt gave him a check for the amount, which was cashed by the prisoner at Messrs. Crompton's. About the 10th of January circumstances came to the knowledge of Mr. Butt respecting embarrassment of the prisoner, which led to his sending to him for the purpose of conversing with him upon the subject. Mr. Butt asked, in the course of it, what had become



of the money paid to the prisoner, and was informed by him that it was in the savings-bank. Mr. Butt inquired in whose name, and was told that it had been paid, as from Mr. Butt, not into his account, but in the prisoner's own name. At the same time he produced a book, in which he showed an entry in these words, "Received from the Rev. Mr. Butt, 18*l*. 3*s*. 9*d*., " saying, "You see it's all right." Mr. Butt thereupon said no more. Subsequently he told the prisoner that he could not suffer him to do service in the church, as there was such excitement in the town, and desired that the prisoner would go to London and make arrangements respecting his affairs, which prisoner said he would do. About a week after this interview Mr. Butt inquired at the savings-bank whether the money had been paid in, and found that it had never been paid. The prisoner was accordingly taken into custody. It was elicited, in cross-examination, that at the former interview he had made an offer to pay the money to Mr. Butt; that the money was not payable to the society in London until March, which had not arrived at the time when the prisoner was taken on the present charge; that he had acted as secretary and treasurer of a local society in connection with that in London; and that he also acted as treasurer with reference to other charities in the parish, there being no appointed secretary or treasurer. Mr. Butt considered that his curate was responsible to him, but it did not appear that the vicar had acted as treasurer.

At the close of the case for the prosecution,

WILLES, J., said, that in his judgment the indictment was not sustained by the facts. The prisoner is charged with larceny as a bailee, but he was the acting treasurer of the society, and as such it was his duty to deposit or invest the monies received, and he was not required to pay over the specific coins that came into his hands, which is essential to a bailment. A similar case had come before himself and Byles, J., at Oxford, and on consultation, they had so held. Nor could the count for larceny be sustained, because the prisoner was not a servant, and the first possession of the money was a lawful one. He was only civilly liable for his default.

*Verdict, Not Guilty.*

REG.  
v.  
GARRETT.  
1860.  
Bailee.

## COURT OF CRIMINAL APPEAL.

November 10, 1860.

(Before ERLE, C.J., CROMPTON, J., BRAMWELL, and CHANNELL, BB., and HILL, J.)

REG. V. BURNSIDES. (a)

*False Pretences—Indictment—Evidence.*

*An indictment for false pretences charged that the prisoner falsely pretended to the prosecutor that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him the prisoner about some carpet, and had asked him to procure a piece of woollen carpet, to wit, about twelve yards, by which, &c. Whereas no such person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of woollen carpet.*

*The evidence was, that the prisoner stated to the prosecutor that he wanted some carpeting for a family in a large house in the village, who had had a daughter lately married, and thereby obtained twenty yards of carpet from him.*

*The evidence to negative the false pretence was that of a lady living in the village whose daughter was married about a year ago, who stated that she had not sent the prisoner to the prosecutor for the carpet ;*

*Held, that there was a sufficient false pretence alleged in the indictment, and that it was sufficiently negatived by the evidence.*

**C**ASE reserved by the Chairman of the Midsummer Quarter Sessions for the North Riding of Yorkshire for the opinion of this Court.

At the Midsummer Quarter Sessions for the North Riding of Yorkshire, holden at Northallerton on the 3rd July, 1860, John Burnside was indicted for obtaining a piece of carpet under false pretences.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

The following is a copy of the indictment:—

“North Riding of the county of York, to wit.—The jurors for our Lady the Queen upon their oath present, that J. Burnsidess on the 8th May, 1860, unlawfully, knowingly, and designedly did falsely pretend to one George Stonehouse, that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him the said J. Burnsidess about some carpet, and had asked him the said J. Burnsidess to procure a piece of woollen carpet, to wit, about twelve yards. By means of which said false pretences the said J. Burnsidess did then unlawfully obtain from the said G. Stonehouse twenty yards of woollen carpet, of the goods and chattels of the said G. Stonehouse, with intent thereby then to defraud, whereas in truth and in fact no such person as aforesaid had then or at any other time been at the said J. Burnsidess about any carpet, nor had any such person as aforesaid asked the said J. Burnsidess to procure any piece of woollen carpet whatsoever, to the great damage and deception of the said G. Stonehouse, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.”

REG.  
v.  
BURNSIDES.  
—  
1860.  
*False pretences.*

The evidence was, that the prisoner went to the prosecutor's shop in the village of Snainton, and stated that he wanted some carpeting for a family living in a large house in that village, who had had a daughter lately married. Upon this the prosecutor gave the prisoner about twenty yards of carpeting, which the prisoner afterwards sold in the neighbourhood to two different persons at a higher price than that which the prosecutor would have charged.

The only evidence to negative the false pretence charged in the indictment, was that of a lady living in the village of Snainton, whose daughter was married about a year ago, who stated that she had not sent the prisoner to the prosecutor's shop for the carpet.

At the close of the case for the prosecution the prisoner's counsel objected,

That the indictment did not sufficiently allege any false pretence;

That upon the evidence there was nothing to go to the jury; and

Thirdly, that the false pretence alleged in the indictment had not been sufficiently negatived by the prosecution.

The Court decided that there was a sufficient false pretence in the indictment, and that there was evidence to go to the jury in support of it.

The jury returned a verdict of guilty.

The judgment of the Court was reserved until the opinion of the Court of Criminal Appeal could be taken on the point raised by the prisoner's counsel.

REG.  
v.  
BURNSIDES.  
—  
1860.

*False pretences.*

The opinion of the Court is therefore requested on the point reserved.

The prisoner was discharged on recognizance of bail to appear at the next Epiphany sessions to receive the judgment of the Court.

CATHCART, Chairman.

No counsel appeared on either side.

By the COURT,

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*November 10, 1860.*

(Before ERLE, C. J., CROMPTON, J., CHANNELL, and  
BRAMWELL, BB., and HILL, J.)

REG. v. GUELDER. (a)

*Embezzlement—Assistant overseer—Sums received for rates—Fraudulently obtaining overseers' vouchers—Sums properly entered in the assistant overseer's books.*

*It was the assistant overseer's duty to collect the rates, and upon receipt to pay them into a bank to the account of the overseers, and then to obtain the overseers' receipts for sums so paid to their account; it was his duty also to enter the rates, when received by him, in a book. At the audit the accounts so entered by him were contrasted with the receipts given to him by the overseers. Just previous to an audit, the assistant overseer fraudulently obtained from the overseers receipts for sums, by stating that he had paid them into the bank to the overseers' account, when in truth he had not, having previously misappropriated them. He produced such receipts to the auditor, and deceived him as to his having handed the moneys over to the overseers:*

*Held, that he was properly convicted of embezzlement, and that the fact of entering the sums when received in his book did not alter the character of the offence.*

CASE reserved for the opinion of this Court by Wilde, B., at the last assizes for the county of York:—

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

Charles Guelder was tried before me, and found guilty on two counts charging him with embezzlement.

For the purposes of this case the conviction of Charles Guelder is to be deemed and taken to be a good conviction, unless the facts about to be stated, do not in law constitute the crime of embezzlement.

REG.  
v.  
GUELDER.

1860.  
Embezzlement.

The prisoner was assistant-overseer of the township of Bradfield, and such servant as stated in the indictment.

It was the prisoner's duty, as such servant, to collect the rates from the ratepayers of the township.

The course was, for the prisoner, on receiving any rates, to pay them into a neighbouring bank to the account of the overseers, and then to obtain from the overseers, or one of them, a receipt in a printed form signed by such overseer for such sum so paid to their account.

The prisoner also kept a book, in which it was his duty to enter from time to time the various sums received by him.

At the audit, which took place half-yearly, the accounts thus entered as received by the prisoner were contrasted with the receipts given to him by the overseers.

He charged himself by the book and discharged himself again by the overseers' receipts.

The above being the course of business, the prisoner in the month of May in the present year, on the day of, and just previous to the audit for the half-year, went to two of the overseers, and obtained from them several receipts for various sums stated in the indictment.

He obtained these receipts fraudulently by stating that he had paid the said sums into the bank to the overseers' account, which in truth he had not. He had, in fact, previously appropriated the said sums to his own purposes, and he obtained the receipts with the view of deceiving the auditor as to his having handed the moneys over to the overseers. He produced the receipts at the audit, and was successful.

But he had duly and properly entered the said sums, when received, in the aforesaid book, and had thus openly charged himself with the receipt of them.

It was contended that having thus charged himself with the receipt of the money he could not be guilty of embezzlement.

The prisoner was convicted and sentenced, but I reserved for the consideration of this Court the following question:—

Could the prisoner, on the above facts, be lawfully convicted of the crime of embezzlement?

JAMES WILDE.

No counsel appeared to argue this case on the prisoner's behalf.

*West*, for the prosecution, was stopped by the Court.

ERLE, C.J.—I am of opinion that this conviction ought to be affirmed. It is perfectly clear that the money was embezzled; and

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*Embezzlement.*

the offence was committed with one of the ordinary concomitants of fraud, fraudulent accounting. The question submitted to us is, whether the prisoner is entitled to be acquitted, because he made a true and correct entry of the sums when received in his book. I think not, for those entries may probably have been made with forethought and a view to this defence. I therefore see no reason for doubting the propriety of this conviction.

CROMPTON, J.—I am of the same opinion. The crime of embezzlement was complete when the prisoner appropriated the money. What took place afterwards could not alter the character of the offence. His entering in the book the sums he had received after the embezzlement had taken place could not purge the prisoner's guilt in any way.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 10, 1860.

(Before ERLE, C.J., CROMPTON, J., CHANNELL, and  
BRAMWELL, BB., and HILL, J.)

REG. v. JAMES CRAWSHAW. (a)

*Lotteries—Evidence of keeping—Indictment—Verdict accompanied with  
a recommendation—Ignorance of law.**By the 10 & 11 Will. 3, c. 17, s. 1, lotteries are declared common and  
public nuisances. Sect. 2, which came into operation on a subse-  
quent day, rendered persons keeping lotteries liable to a penalty, to be  
sued for by information or action. The 42 Geo. 3, c. 119, contained  
similar enactments:**Held, that the keeping a lottery was an indictable offence.**The defendant kept an eating-house, exhibited placards headed "Great  
Eastern Money Club," "White's Race Club for the Radcliffe Cup,"  
"White's South Union Weekly Money Club," and others similar,  
and sold tickets in respect thereof. Prizes were drawn and the holders  
of the tickets whose numbers were drawn for prizes received the same,  
and the defendant delivered out the prizes to such ticket-holders, but  
there was no evidence to connect the defendant with any drawing by  
lottery or otherwise for the prizes:**Held, that this evidence was sufficient to support a conviction against  
the defendant of keeping a lottery, but not sufficient to support a charge  
of keeping a house for betting upon horse-racing, under the 16 & 17  
Vict. c. 119.**The jury returned a verdict of guilty, but recommended the prisoner to  
mercy, on the ground that perhaps he did not know that he was acting  
contrary to law:**Held, that the conviction was not invalidated by the addition to the  
verdict.*

CASE reserved for the opinion of this Court by the Chairman  
at the General Quarter Sessions of the peace for the county  
of Lancaster, holden by adjournment at Salford, in the said  
county, on the 27th, 28th and 29th days of August, 1860.

James Crawshaw was tried on the following indictment:—

County of Lancaster, to wit.—The jurors for our Lady the

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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Queen, upon their oath present, that J. Crawshaw, on the 28th of July, 1860, and on divers other days and times between that day and the taking of this inquisition, at the borough of Ashton-under-Lyne, in the county of Lancaster, unlawfully did set up, keep, and maintain a certain lottery, to wit, a Little Go, to the great damage, and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting and residing, and to the evil example of all others in the like case offending, and against the form of the statutes in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Crawshaw on the said 28th of July, 1860, and on divers other days and times between that day and the taking of this inquisition, at the borough of Ashton-under-Lyne aforesaid, unlawfully did set up, conduct, and maintain a certain lottery not authorised by Parliament, in which said lottery prizes were awarded to the subscribers thereto, for whom certain prizes were drawn, to the great damage, and common nuisance, of all the liege subjects of our Lady the Queen there inhabiting and being, and to the evil example of all others in like case offending, and against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Crawshaw, on the said 28th of July, 1860, and on divers other days and times between that day and the taking of this inquisition, at the borough of Ashton-under-Lyne aforesaid, did unlawfully open, keep, and use a certain room in a certain house, to wit, a house in Old-street, in the said borough, which said room and house were then occupied by him the said J. Crawshaw for the purpose of money being received by the said J. Crawshaw, then being the occupier of such room as aforesaid, as the consideration for securing the paying by some other persons, to wit the Great Eastern Money Club, of money on the event of a certain horse-race, to the great damage and common nuisance of all the liege subjects of our Lady the Queen there inhabiting, being, residing, and passing, to the evil example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Crawshaw, on the said 28th of July, 1860, did unlawfully open, keep, and use a certain room in a certain house, to wit, a house in Old-street, in the said borough, which said room and house were then occupied by him the said J. Crawshaw for the purpose of money being received by the said J. Crawshaw, then being the occupier of such room as aforesaid, as the consideration for an undertaking by him the said J. Crawshaw to pay money on the contingency of horse-races, to the great damage and common nuisance of all the liege subjects of



our Lady the Queen there inhabiting, being, residing, and passing, to the evil example of all others in like cases offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Crawshaw, on the said 28th of July, 1860, and on divers other days and times between that day and the taking of this inquisition, did unlawfully set up, keep, maintain, and conduct a lottery not authorised by Parliament, to the common nuisance of all the liege subjects of our Lady the Queen, and to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The first witness who was called was John Preston. His evidence was as follows:—I am a police constable of the borough of Ashton-under-Lyne. I know the defendant; he lives in Old-street, Ashton-under-Lyne, and keeps an eating-house there. On the 28th of July last I saw in his window a placard—a large one. After seeing it I went into the house; his wife was there, and the defendant was in the shop-place also. I said “I want a horse-ticket.” I was not in uniform. His wife gave me one out of a drawer. I paid sixpence for it. I asked her “When and where do they draw?” She said, “It will be drawn on Monday night, where, I do not know; it is not drawn regularly at the same place.” I then came away. Defendant was present at the time. On Monday the 30th of July I went again, defendant and his wife were in. I bought another horse-ticket. The defendant's wife served me from the same drawer. I paid sixpence for it. I asked when and where it would be drawn. Defendant's wife said, “To-night; but I do not know where.” I purchased the same day a list. This is it (the list is annexed, marked B). I paid a half-penny for it. I examined it, to look whether my ticket purchased on the first occasion was a prize. In consequence of what I saw there, I went the next morning, Tuesday, the 31st, to the defendant's house, and took with me the first ticket I had bought. I gave it to the defendant, and said, “There is a prize for this,” and gave it to him. He went into the kitchen, as if to look whether it was so, and returned and gave me 4s. 10d. I asked him why he did not give me the 5s. He only laughed. My other ticket was not a prize. I afterwards gave it to chief-constable Dalglish. This is it (this ticket is annexed, marked A). Both the tickets were for the same drawing.

Cross-examined.—I went to defendant's by direction of my superintendent. I went alone. I can't say whether defendant knew me. I had then been a police-constable at Ashton-under-Lyne but a few weeks. The first time I went was at half-past four p.m. on the Saturday. I saw no one there the first time but defendant and his wife.

The next witness called was William Chadwick, whose evidence

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was as follows:—I am an inspector of police at Ashton-under-Lyne. On Thursday, the 2nd of August last, I apprehended the prisoner under a warrant. I went to his place and found there four placards stuck up in the window (the four placards are annexed and marked respectively with the letters C, D, E, F). I asked defendant to hand me what tickets he had, and his wife handed me from a drawer in the counter these tickets now produced. (The tickets taken from the drawer and now produced in court purported to be tickets in two different money clubs, White's South Union Weekly Money Club, and the Great Eastern Money Club. These tickets were not each on separate pieces of paper, but a number printed in succession on the same slip of paper, but so as to be easily separated one from the other. There were seventy-six in all produced, fifty-six in the first above-mentioned, and twenty in the last above-mentioned club. A few tickets of each are annexed, marked respectively with the letters H and I.)

This, with some formal evidence, closed the case for the prosecution.

The counsel for the defendant contended that the first, second, and fifth counts of the indictment were bad in substance; that an indictment did not lie, either under the statute 10 & 11 Will. 3, c. 17, or under the statute 42 Geo. 3, c. 119; that in the case of both these statutes an offender could not be proceeded against under the 1st section taken by itself, but must be proceeded against, if at all, under the 2nd and 3rd sections.

They also contended that the third and fourth counts of the indictment were bad in substance; that the statute 16 & 17 Vict. c. 119, did not apply at all to the case; that that was no proof of the defendant's house being a betting-house within the meaning of that statute; that there was no proof of the event or contingency here being such a one as is provided for in the statute.

The Court overruled these objections.

The counsel for the defence then submitted that there was no evidence for the jury in support of the first, second, and fifth counts.

The Court decided that there was.

The counsel for the defendant then addressed the jury, who found the defendant guilty on each count of the indictment, but recommended him to mercy, on the ground "that perhaps he did not know he was acting contrary to law."

The counsel for the defendant submitted that this was a verdict for the defendant.

The Court ruled otherwise, but allowed the defendant to go out on bail until the next Hilary sessions, and now submit the case for the opinion of this Court, as to whether the objections taken by the counsel for the defendant, or any and which of them, are well-founded and ought to prevail.

E. OVENS,

Chairman of the above Court of Quarter Sessions.

*Copy of Exhibit A.*

The Great Eastern Money Club.

Four thousand prints at sixpence each.

The 23rd ballot will take place on Monday,

No. 1787.

July 30th, 1860.

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*Copy of Exhibit B.*

Ashton-under-Lyne.

Great Eastern Money Club.

4000 shares issued.

The 23rd ballot published on Monday the 30th July, 1860.

First prize, 33, 10*l.*; second ditto, 2267, 5*l.*; third ditto,  
1830, 2*l.* 10*s.*

Then followed a series of numbers for prizes of 10*s.* and 5*s.* each.*Copy of Exhibit C.*

The Great Eastern Weekly Ballot.

4000 shares or more.

The meetings take place every Monday evening.

Shares:—First prize, 10*l.*; second ditto, 5*l.*; third ditto, 2*l.* 10*s.*The remainder divided into shares of 10*s.* each.Shares 6*d.* each.—May be had here.*Copy of Exhibit D.*

White's

Race

Engraving of Running Horses.

Club

For the Radcliffe Cup.

3000 shares at 1*s.* each.

To be drawn on Saturday, August 11, 1860

First prize, 10*l.*; second ditto, 5*l.*; third ditto, 2*l.*Starters and non-starters, 1*l.* each.Remainder in 10*s.* prizes.Tickets 1*s.* each.—Sold here.

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*Copy of Exhibit E.*

White's South Union Weekly Money Club.

2000 Subscribers at 6*d.* each.

First prize, 10*l.* ; second ditto, 5*l.* ; third ditto, 2*l.*

5 at one pound each ; 21 at ten shillings each ;

60 at five shillings each.

Distribution every Tuesday evening at Eight o'clock.

Tickets 6*d.* each.—Sold here.

*Copy of Exhibit F.*

North-Western Weekly Money Club.

Published every Wednesday evening at Seven o'clock.

Tickets 6*d.* each.—May be had here.

*Copy of one of the Exhibits H.*

1908. White's South Union Money Club.

[No. 48.]

2000 subscribers at 6*d.* each.

First prize, 10*l.* ; second ditto, 5*l.* ; third ditto, 2*l.*

Five at one pound each ; twenty-one at 10*s.* each ;

sixty at five shillings each.

To be drawn Tuesday Evening, August 7th, 1860, at 8 p.m.

*Copy of one of the Exhibits I.*

No. 481. The Great Eastern Money Club.

Four thousand prints at 6*d.* each.

The 24th ballot will take place on Monday,

August 6th, 1860.

Dr. *Wheeler* (*Kaye* with him) for the prisoner.—This is not an indictable offence under either of the statutes, 10 & 11 Will. 3 c. 17 (*a*), or the 42 Geo. 3, c. 119 (*b*). If an offence has been

(*a*) The 10 & 11 Will. 3, c. 17, s. 1, enacts, "That all such lotteries and all other lotteries are common and public nuisances, and that all grants, patents, and licences for such lotteries or any other lotteries are void and against law."

Sect. 2.—"And be it further enacted by the authority aforesaid, that from and after the nine and twentieth day of December, which shall be in the year of our Lord, 1699, no person or persons whatsoever shall publicly or privately exercise, keep open, show or expose to be played at, drawn at, or thrown at, or shall draw, play or throw at any such lottery or any other lottery, either by dice, lots, cards, balls, or any other numbers or figures or any other way whatsoever, and that every person or persons that shall after the said nine and twentieth day of December, exercise, expose, open, or shew to be played, thrown, or drawn at any such lottery, play, or device, or other lottery, shall forfeit for every such offence the sum of 500*l.* to be recovered by information, bill, plaint, or action at law in any of his Majesty's Courts at Westminster, wherein no essoin, wager of law, nor any more than one imparlance shall be allowed, one-third

committed against those statutes the remedy is by proceeding according to the statutes. Though the 1st section of 10 & 11 Will. 3 contains a prohibition, and, under ordinary circumstances an indictment would lie for an infringement of it, yet in the second section the remedy is provided, and that is the proper course of proceeding. The 2nd section enacts that from and after the 29th of December, 1699, the offence shall be punishable by a penalty, to be recovered by information, bill, plaint or action at law. The 1st section came into operation at an earlier date than the second one, and therefore, if the 1st section gave a separate and independent remedy, the result would be that, under the 1st section, an offender was liable to an indictment and a severer penalty than he would be under sect. 2. It is submitted that these are not cumulative provisions, and that the statute which creates the offence also provides the remedy. Moreover, there would have been no object in the 2nd section, if a remedy by indictment had been provided by the 1st. The reason for postponing the operation of sect. 2 was probably that the 1st section created the prohibition, and it was desirable to grant time by way of warning the public before making the penalty attach.

ERLE, C.J.—Is not sect. 2 a power to common informers to sue for penalties?

CROMPTON, J.—How does this point arise? Is this a proceeding in arrest of judgment?

Wheeler.—The objection was taken in the ordinary way at the close of the case for the prosecution.

part thereof to the use of his Majesty, his heirs and successors, one other third part thereof to the use of the poor of the parish where such offence shall be committed, and the other third part thereof, together with double costs, to the party that shall inform and sue for the same, and the said parties so offending shall likewise be prosecuted as common rogues, according to the statutes in that case made and provided."

Sect. 3.—Makes every person playing, throwing, or drawing at any such lottery, &c., liable for every such offence to the sum of 20*l*., to be recovered in the same manner as by the second section.

(b) The 42 Geo. 3, c. 119, s. 1, enacts "That all such games or lotteries called Little Goes, shall from and after the passing of this act be deemed and are hereby declared common and public nuisances and against law."

Sect. 2, enacts, "That from and after the 1st of July, 1802, no person or persons whatsoever shall publicly or privately keep any office or place, to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a Little Go, or any other lottery whatsoever not authorized by Parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls or by numbers or figures, or by any other way, contrivance, or device whatsoever any such game or lottery, in his or her house, room, or place, upon pain of forfeiting for every such offence the sum of 500*l*., to be recovered in the Court of Exchequer at the suit of his Majesty's Attorney-General, and to be to the use of his Majesty, his heirs and successors, and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an act passed in the seventeenth year of the reign of his late Majesty King George the Second, intituled, 'An Act to amend and make more effectual the Laws relating to Rogues, Vagabonds, and other Idle and Disorderly Persons, and to Houses of Correction,' and shall be punishable as such rogue and vagabond accordingly."

Sect. 3, enacts, "That every person offending against this act, against whom no information shall have been made as aforesaid shall be deemed a rogue and vagabond within the true intent and meaning of the 17 Geo. 2, c. 5, and the 27 Geo. 3, c. 2, and shall be punishable as such rogue and vagabond according to the said acts and this act."

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ERLE, C.J.—We will treat this case as a motion in arrest of judgment.

*Wheeler*—The object then was to give warning that a lottery was a common and public nuisance. Before the passing of the statute of 10 & 11 Will. 3, lotteries were common all over England. The same argument applies to the counts framed upon the 42 Geo. 3, c. 119, the 1st section of which enacts that from and after the passing of that act, lotteries and Little Goes shall be deemed a public nuisance, and in the same manner as the statute of Will. 3, the 2nd section enacts that from the 1st July, 1802, persons keeping lottery offices shall be liable to a penalty, and be deemed rogues and vagabonds.

CROMPTON, J.—Blackstone ranks lotteries among common nuisances, though he does not say so in so many words.

*Wheeler*.—The 1st section speaks of the thing as a nuisance, and the 2nd deals with the persons practising it. The cases of *Rex v. Gregory* (5 B. & Ad. 555), and *Rex v. Harris* (4 T. R. 205), and *Dwarris* on Statutes were then cited as to the construction of sections like these. Secondly, supposing this to have been an indictable offence, there was no evidence for the jury on which they were justified in finding the defendant guilty. There ought to be evidence of a lottery or a determination by lot brought home to the defendant. There was no evidence that the place was a place, or the game a game, within the meaning of the act, or to connect the defendant with the distribution of the prizes. An agency should have been proved against the defendant. The distribution of prizes may have been in some other manner than by lot. Thirdly, the third and fourth counts are not made out. There was no proof that this was a betting-house within the act 16 & 17 Vict. c. 119 (c). Lastly, there must be evidence of a lottery to make an offence; but what evidence is there of the defendant's setting up, keeping, and maintaining a lottery? In the case of *Ryder v. Wood* (29 L. J. 1, M.C.) it was held that before an artificer can be convicted under the Master and Servant Act (4 Geo. 4, c. 34, s. 3) of absenting himself from the service during the contract, the justice ought to be satisfied that he absented himself without lawful excuse, and that he knew he had no lawful excuse.

No counsel appeared to argue on behalf of the prosecution.

(c) The 16 & 17 Vict. c. 119, is the Act for the Suppression of Betting Houses. Sect. 1.—“No house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same or any person, procured or employed by or acting for or on behalf of such owner, occupier, or keeper or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper or person as aforesaid, as for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter, any valuable thing on any event or contingency of or relating to any horse-race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any valuable thing upon any such event or contingency as aforesaid, and every house, office, room or other place, opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.”

ERLE, C.J.—We have considered this case, and are of opinion that the evidence bearing on the counts relating to horse-racing was not sufficient to support those counts. With respect to the counts on the Lottery Acts, we are of opinion that there was evidence for the jury which justified them in coming to the conclusion they did. This was virtually the purchase of a ticket in a lottery, in the expectation of drawing a prize. The defendant was concerned both in selling the ticket and delivering out the prizes to the purchaser, and the jury were well justified in inferring that he was intimately connected with the lottery. The objection that there was no evidence to support those counts therefore fails. We have looked at the verdict of the jury recommending the defendant to mercy, as perhaps he was not acquainted with the law, and we are, nevertheless, of opinion that the conviction is valid. Ignorance of the statute is no excuse for the violation of its provisions. That ground does not annul the verdict. The great point in Mr. Wheeler's argument is really one in arrest of judgment. The defendant was indicted for a misdemeanour supposed to have been created by the 10 & 11 Will. 3, which in the 1st section declares that the keeping of a lottery shall be a common and public nuisance, and in the 2nd section prohibits all persons from keeping lotteries, under a penalty of 500*l.*, at the suit of a common informer, or if not so prosecuted, the statute makes them liable as vagrants or rogues; and the second part of the act came into operation at a different time to the first. It was contended that that was a declaration that it was not intended that the first enactment should be the subject of an indictment, and that the proper remedy was under the 2nd section, and therefore that this indictment could not be sustained. We have attended to that argument, but we find a principle to have prevailed for a long time, that where the Legislature declares a thing to be a common and public nuisance, the person who does the thing renders himself liable to an indictment. I take the case of *Rex v. Gregory* to be an application of that principle by a court of very great authority. That principle is an answer to the objection. We therefore hold that the counts which are framed on the Lottery Acts are not bad in point of law. The result will be, that the conviction will be affirmed on these counts.

The rest of the Court concurring,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*November 10, 1860.*

(Before ERLE, C.J., CROMPTON, J., BRAMWELL and CHANNELL, B.B., and HILL, J.)

REG. v. GEORGE OLIVER. (a)

*Indictment—Counts for grievous bodily harm and unlawfully occasioning actual bodily harm—Evidence of common assault.**Upon a count for assaulting, beating, wounding, and occasioning actual bodily harm against the statute, the prisoner may be convicted of a common assault.*

CASE reserved for the opinion of this Court by the Chairman of the Court of Quarter Sessions of the peace for the county of Northumberland, held at Alnwick, in the said county, on the 17th of October, 1860.

The prisoner, George Oliver, was indicted at these sessions for a misdemeanour, of which indictment the following is a copy:—

“Northumberland, to wit.—The jurors for our Lady the Queen upon their oath present that George Oliver, on the 18th August, 1860, unlawfully and maliciously did inflict upon one Robert Bainbridge some grievous bodily harm, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

“Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Oliver afterwards, on the said 18th of August, in the year aforesaid, unlawfully did make an assault in and upon the said Robert Bainbridge, and did then unlawfully beat, wound and ill-treat the said Robert Bainbridge, and did thereby then unlawfully occasion actual bodily harm to the said Robert Bainbridge, and then did other wrongs to the said Robert Bainbridge, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.”

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.



Upon this indictment the jury found a verdict of "guilty of a common assault."

An objection was taken by the counsel for the prisoner that this finding amounted to an acquittal, and he moved in arrest of judgment.

The Court thereupon postponed the judgment, and reserved the following question of law, which had so arisen on the trial, for the consideration of the Justices of either Bench and Barons of the Exchequer, under the provisions of the statute of the 11 & 12 Vict. c. 78, viz.—

Whether the conviction can be sustained?

And in the meantime directed that the prisoner be committed to the common gaol at Morpeth, until he shall enter into a recognizance, himself in 20*l.*, and two sureties in 25*l.* each, or one in 50*l.*, conditioned to appear at the Court of Quarter Sessions to be holden for the county of Northumberland next after he shall have notice given to him by the prosecutor to receive the judgment of this Court, if it should be empowered to pass any such judgment.

CHARLES WM. ORDE,

Chairman of the said Court of Quarter Sessions.

No counsel appeared to argue on either side.

By the COURT,

*Conviction on the second count affirmed.*

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## COURT OF CRIMINAL APPEAL.

November 10, 1860.

(Before ERLE, C.J., CROMPTON, J., BRAMWELL and CHANNELL, B.B., and HILL, J.)

REG. v. JAMES TONGUE. (a)

*Embezzlement—Clerk or servant—Secretary of money-club—Suing on note of club in his own name—Duty—7 & 8 Geo. 4, c. 29, s. 47.**The prisoner, the secretary of a money-club, was directed by the club to sue upon a joint promissory note, the property of the club, or get better security, and the note was handed to him by W., the treasurer, who was not a member of the club, and who at the same time desired that his name should not be used in the legal proceedings. The prisoner indorsed W.'s name on the note, employed an attorney, who issued a writ, and in consequence of the action money was paid to the prisoner by one of the joint makers, which the prisoner fraudulently withheld from the club and appropriated.**The duties of the prisoner, according to the rules of the club, were duties cognate to that of receiving money for the club, but that duty was not expressly named in the rules :**Held (Crompton, J. dubitante), that the prisoner had received the money as servant for the use of the club, and that he was properly convicted of embezzlement :**Held, also (affirming Spencer's case, Russ. & Ry. 299), that the employment to receive money on this occasion was sufficient to constitute an employment within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47, though receiving money was not the prisoner's usual employment, and it was the only instance in which he was so employed.***C**ASE reserved by the Recorder of Birmingham for the consideration of the Court of Criminal Appeal:—

At a Court of General Quarter Sessions, held at Birmingham,

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

on the 11th of January, 1860, James Tongue was charged before me, as appears by the indictment hereto annexed, with embezzlement.

The prisoner pleaded not guilty.

The jury found their verdict against the prisoner.

The facts were these:—

The prisoner was secretary to a money-club, held at the house of Joseph Whiles, Johnson's Head Inn, Birmingham. The rules of the club, which were printed, and a copy given to each member, were (as far as they are material to the present case) as follows:—

Rule 2. That payment of one night's instalment shall constitute any person a member, approved of by this society, who may subscribe for one or more shares. Club-night to mean every alternate Monday.

Rule 9. Two of the members shall act as stewards for one quarter, in rotation, as their names appear on the books.

Rule 10. Three members shall be appointed for one quarter, to make inquiries as to the sufficiency of the securities proposed, who shall make their report on the following club-night. That the said committee shall be exempt from standing as stewards in rotation.

Rule 12. It shall be the duty of the secretary, when any important business requires it, or the society thinks proper, to summon by circular all the members to a special meeting.

Rule 17. That Mr. Tongue (the prisoner) be appointed secretary to this society, who shall receive for his services a fair remuneration, to be decided by the members, and shall be exempt from paying the refreshment money. He shall make the promissory notes on demand, and shall always be one of the committee. Should he not attend or send a proper person to act for him, he shall forfeit 1s. 6d.

Rule 21. Mr. J. Whiles shall act as trustee, during the pleasure of the society, who shall sign all orders upon the treasurer for payments. All cheques or orders upon the treasurer to be countersigned by the secretary.

Rule 22. All moneys belonging to this society shall be lodged in the district bank, and the proprietor of the house be deputy-treasurer (during the club's pleasure), to take all moneys amounting to ten pounds and upwards to the said bank to be deposited by him thus:—"No. 4. Fifty pounds; society held at Mr. J. Whiles, Johnson's Head Inn, Edmond-street." The bank-book to be laid before the society each club-night.

Rule 23. No alteration shall be made to these articles, unless notice thereof be given according to article 12, and such alteration be approved of by a majority of the members then present.

The practice of the club was for the stewards to receive the payments of members, and to pay over such moneys to the deputy-treasurer, J. Whiles, and for Whiles to retain in his hands all the moneys and securities belonging to the club, the notes

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being pasted in the book called the Bond-Book, which remained in the custody of Whiles.

In the month of April, 1857, a promissory note was made by one Brough as principal, and by Starkey and Adcock as co-sureties, for the sum of 50*l.*, payable to the order of J. Whiles, which said note, the property of the club, was by order of the club taken out of the Bond-Book and handed to the prisoner by Whiles.

In consequence of doubts as to the solvency of the makers of the note in question, the prisoner was directed by the club then in meeting assembled to sue upon the note so handed to him by Whiles, or to get better security for the money which had been advanced upon it.

At the time when the note was handed to the prisoner, Whiles desired that his name should not be made use of in any legal proceedings.

After receiving the note the prisoner indorsed it with the name of Whiles, and employed an attorney who issued a writ against the makers of the note, at the suit of the prisoner.

In consequence of the action so brought, Adcock, one of the joint makers of the note, paid to the prisoner two several sums of 30*l.* and 10*l.* the moneys charged in the indictment.

Henry Jenkins and the other parties mentioned in the indictment, except Whiles, were members of the club. Whiles was not a member.

The prisoner, on several occasions after the receipt of the moneys in question, denied such receipt, and alleged in answer to inquiries made, that he had not received the money on the note, but had obtained a better security from Brough.

It was proved that the prisoner had received these several moneys. The prisoner, after the receipt of the moneys in question, returned the note to Whiles as unpaid, and the note was repasted in the Bond-Book.

I put the following questions to the jury:—

1. Did the prisoner receive the moneys in question?
2. Ought he to have paid them over to the club?
3. Did he withhold them from the club fraudulently?

The jury specially found each of such questions against the prisoner, and also found him guilty generally.

The Court having grave doubts of the validity of a conviction on the evidence above set forth, respited judgment, and discharged the prisoner upon bail.

The questions are:—

1. Was the prisoner clerk or servant within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 47? Or, was he a person employed for the purpose of receiving the money in question? Or, was he a person employed in the capacity of clerk or servant?

2. Was the money in question received by the prisoner by virtue of his employment, or in his capacity of clerk or servant?

3. Was the money in question received by the prisoner for or in the name, or on the account of his master or masters?

M. D. HILL, Recorder.

*Gibbons*, for the prisoner.—The conviction was wrong. The prisoner did not receive the money by virtue of his employment as the servant of the club. It was no part of his duty to receive moneys for the club. The statute only applies where the master is the legal owner of the money. On the face of the note it appears that it was indorsed to the prisoner, and the legal effect of the indorsement was to pass the property in the note to the prisoner. And this the club intended to do, so as to enable him to sue upon it. He could only sue upon the note, as attorney or as the holder. Not being qualified to sue as attorney, he could sue only as principal and holder of the note. As holder he was legally the owner, and clothed with all the legal accessories to ownership. The club had divested themselves of all legal proprietorship in the note, and only retained an equitable right to it, which a court of law can take no notice of. In respect of the note and suing upon it, the prisoner was not the servant of the club within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47. He was the only person who could have taken money out of court, or controlled the action, or entered satisfaction on the roll.

HILL, J.—Was not Whiles' indorsement necessary to make him owner? The prisoner wrote Whiles' name upon the note.

*Gibbons*—There was a delivery of the note to him by Whiles, and that must be taken to have been for the purpose of passing the property in the note to him. If he had indorsed Whiles' name fraudulently, it would have been a forgery. It is not disputed that the prisoner had the authority of Whiles to sue upon it. Then, having employed an attorney to bring the action, the prisoner became liable for the costs, and that gave him a property in the note till the costs were paid. If the prisoner had given a release in the action, instead of receiving the money, he could not have been made liable in any way: (*Reg. v. Harris*, 6 Cox Crim. Cas. 363.) The most that the prisoner did was to make an improper use of his position as secretary.

*O'Brien*, for the prosecution.—It is an assumption, not warranted in law, that the property in the note passed to the prisoner when it was handed over to him. The prisoner was the servant of the club; he was appointed by a rule of the club and received a salary. *Hall's* case (1 Moo. C. C. 474), shows that the prisoner as secretary held the note as the servant of the club. The club and the prisoner stood and acted in the relation of master and servant in this transaction. The club directed him to sue upon the note, or get better security, and when they asked him about the receipt, the prisoner denied the receipt of the money, and said that he had got better security. If the note had been indorsed with the authority of the club in order that the note might be sued on, it would still have been the property of the club, and the prisoner would have held

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it as their servant. If it was indorsed without their authority, the prisoner could not by that fraudulent indorsement acquire any property in the note. The prisoner had no right to employ an attorney to sue for himself, but only for the club. The note was in his possession as servant of the club, and that was the possession of the club, and no property passed to him in the note.

*Gibbons* in reply.

ERLE, C.J.—I am of opinion that the conviction ought to be affirmed. The first question is, whether the prisoner received the money in the character of a clerk or servant. He was secretary to the club, and hired at a salary; and his duties are stated with some detail in the case sent to us. It does not appear to be one of his specified duties to receive money; but he had several duties to perform cognate to the receiving of money, viz., to make applications for interest or instalments due, and for better security or part payment. If the ordinary duties of a person in the employ of another are proximately connected with the receiving of money, the receipt of money for his employer, and appropriation of it to his own use, would make him liable to the charge of embezzlement. It was so laid down in *Spencer's* case (Russ. & Ry. 299). And it is sufficient if there was a specific employment to receive money on one occasion only. The case seems to me, therefore, to fall within the statute as far as the prisoner's employment as a servant is concerned. Then was he within the statute as far as relates to the receipt of the money? Had he a right to the repayment of the loan, and to hold the money as collateral security for the costs? If this had been a mere loan, and the prisoner had been sent to apply for the money, or for better security, I think there would have been no doubt that the receipt would have been for the use of the club. The strength of Mr. Gibbons' argument was, that the prisoner had a cause of action on the promissory note. Now what passed between the club and the secretary had not the effect of passing the absolute property in the note to him as against the club; that gave only a limited authority, *i.e.* to sue upon it. As between him and the club, there is nothing to show that they authorised him to receive the money, and become the absolute owner of the note; and I take the finding of the jury to have affirmed the question put to us, "Was the money received by the prisoner for or in the name, or on the account of his master or masters?" The jury have found that the prisoner had no lien on the money in the capacity of plaintiff, or as making himself liable for the costs of the action. The conduct of the prisoner is clear; he was acting fraudulently, for when asked about it he declared on several occasions that he had not received the money on the note.

CROMPTON, J.—I must own that I am in the same position as the Recorder who has sent this case to us, in entertaining some doubt as to the conviction. The prisoner must be made out to be in the capacity of a clerk or servant. In the present case it is not contended that by virtue of his general employment he was

authorized to receive money. The cases have gone to a considerable length on this point, and it has been held that if a prisoner received money as a clerk or servant on one particular occasion, that would do. My brother Erle has, I think, used the right expression, that the receipt of the money must be upon a duty *cognate* to his general duties. My doubt is, whether the money was received by virtue of any of the duties for which the prisoner was employed. There being a discussion about the payment of the note, it was handed over to the prisoner, and Whiles desired that his name should not be made use of in any legal proceedings upon it. The prisoner then indorsed the note with the name of Whiles. It would be too much to say that by indorsing Whiles' name he was guilty of forgery; and I think that here we ought to take the note as properly indorsed to the prisoner. The prisoner then employed an attorney to sue for him upon the note. My doubt is whether he was a clerk, or servant, or a cognate agent when he was suing in his own name upon the note. Can we consider him as the mere machinery used by the club? The transaction was one *per se*, and not of every-day occurrence, and the law of embezzlement is not to be extended to cases not cognate to the general employment as clerk or servant. This one particular circumstance of suing on the note made it desirable to throw that duty on the prisoner which he accepted. I also have some doubt whether the prisoner can be said to have received the money for the use of the club. Being the party in the suit, I should have thought he received it for himself, to hand over the balance after deducting the costs of the action. I entertain these doubts, but I do not say that I differ from the rest of the Court so far as to wish for the assistance of the other judges.

BRAMWELL, B. — I think the conviction should be affirmed. The first point is whether the prisoner received this money as a clerk or servant, or by virtue of an employment in the nature of a clerk or servant. Suppose a man hired for a definite service as clerk or servant, and employed to receive rent in one instance, it is extremely improbable that it would be held that he received it as clerk or servant. If in this case there was any finding or evidence of a definite set of duties, of which the one in question was not one, I should share the doubt of my brother Crompton. But I doubt, under the circumstances, whether that can be conceded to be so. The prisoner was appointed secretary to the club, and I do not find anywhere any specification of his duties. The office of secretary may comprise many miscellaneous duties. I see nothing inconsistent with his duties when he was told by the club to receive the money as their servant. I think that there was evidence that he was so employed, and that that fact is concluded by the finding of the jury. I cannot think that he received the money for himself, or that the law proceedings make any difference. The bringing of the action was mere machinery to obtain the money, and the money when received was on account of his employers. He sued that he might receive

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the money for his masters, and if he made himself liable for any costs, of which I see no evidence at all, he had no right to employ the attorney and incur them. I therefore think that the prisoner was made out to be the servant of the prosecutors, and that he received the money for them, and that he must be held to have embezzled it.

CHANNELL, B.—I also think that the conviction must be affirmed. Did the prisoner stand in the relation of clerk or secretary to the club? It may be that the office of secretary does not necessarily carry with it the duty of receiving money for the club; but here it is found that the prisoner was employed by the club to sue upon the note, or get better security; and *Spencer's* case is an authority to show that a duty to receive money in a single instance is sufficient. He was to get the money without suit, if he could. The suit was mere machinery for obtaining the money for the club.

HILL, J.—I am of the same opinion.

*Conviction affirmed.*



## COURT OF CRIMINAL APPEAL.

November 10, 1860.

(Before ERLE, C.J., CROMPTON, J., BRAMWELL, and CHANNELL, BB., and HILL, J.)

REG. v. HENRY SPARROW.(a)

*Assault—Verdict of aggravated assault—Grievous bodily harm—Entering verdict.*

*An indictment contained counts charging an assault, and unlawfully and maliciously inflicting grievous bodily harm, and also a count for a common assault. At the trial evidence was given that the prisoner inflicted serious bodily injuries upon the prosecutor. The jury found the prisoner guilty of an aggravated assault without premeditation, and that it was done under the influence of passion :*

*Held, that the verdict was rightly entered on the record on the counts charging an assault and unlawfully and maliciously inflicting grievous bodily harm.*

CASE stated for the opinion of this Court by the Recorder of Birmingham.

The defendant was tried at the Michaelmas Quarter Sessions of the peace for the borough of Birmingham, on an indictment charging him in one set of counts with an assault on one Samuel Griffiths, and with having thereby unlawfully and maliciously inflicted grievous bodily harm upon the said Samuel Griffiths. The indictment contained also a count for common assault.

It was proved in evidence before me, that on the 6th of September, 1860, the prosecutor was standing in a shop in High-street, Birmingham. The defendant passed and saw the prosecutor there. The defendant came and stood on the step of the shop for a few minutes, till the prosecutor was leaving. The defendant then handed to the prosecutor a letter, and asked him to read it. The prosecutor declined to do so, and was going away. The defendant then struck the prosecutor with his fists two violent

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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blows upon the mouth, another blow on the temple, and a fourth on the back of the ear. The prosecutor retreated backwards, the defendant following him up and striking at him. The prosecutor then struck the defendant a blow over the hat with a stick. In retreating the prosecutor's foot slipped against the kerb-stone, and he fell heavily upon his side. The defendant went to him, wrenched the stick from him, and then went away.

The prosecutor and the medical witnesses described the injuries which the prosecutor thereby sustained as follows: three of his front teeth, and other teeth further up the jaw, were loosened, his gums were lacerated, and his mouth was swollen. The pain under which the prosecutor was suffering immediately after the accident was stated by the medical witness to be insufferable. One of the front teeth and the back teeth have since partially fastened, but the two front teeth have not done so, and the prosecutor must lose the same. The mouth and jaw remained sore and stiff, so that the prosecutor could not eat solid food for more than a week. His nervous system received a shock from which he suffered so, that the medical men at an interval of sixteen days, advised his going away from business for a time, and he received an injury on his side from which he had felt, and at the time of the trial (9th October) was still feeling, pain.

I told the Jury that the injuries inflicted on the prosecutor, as described by the medical witnesses and the prosecutor himself, fell within the definition of "grievous bodily harm;" and that if they believed the witnesses, there was evidence to support the first count (or set of counts) in the indictment; and in reply to a question from the Jury, I explained to them that the question of whether the defendant intended to inflict grievous bodily harm upon the prosecutor did not arise in this case, but that the simple point for their consideration was, did the defendant unlawfully "assault the prosecutor and thereby inflict upon him grievous bodily harm?"

The Jury returned the following verdict:—"We find the defendant guilty of an aggravated assault, but without premeditation, and that it was done under the influence of passion."

It was contended on the part of the defendant, that this finding amounted to a verdict of guilty upon the count for the common assault only.

I held otherwise, and directed a verdict of guilty to be entered upon the first set of counts; and the question I submit for the consideration of the Court of Criminal Appeal is, was I right in so holding?

M. D. HILL, Recorder.

*Huddleston* (*A. Wills* with him), for the prisoner.—The question is, whether the Jury found the prisoner guilty of the offence charged in the first set of counts in the indictment? These are framed either upon the 10 Geo. 4, c. 34, s. 29, or the 14 & 15 Vict. c. 19, s. 4. The latter enactment is, "And whereas it is expedient to make further provision for the punishment of

aggravated assaults, be it enacted that if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously inflict, cut, stab or wound any other person, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable at the discretion of the Court to be imprisoned with or without hard labour for any term not exceeding three years: provided, however, that nothing herein contained shall be deemed or taken to repeal the provisions of the 29th section of the 10 Geo. 4, c. 34." The Jury have not found the prisoner guilty of assaulting with intent to commit grievous bodily harm, but only of an aggravated assault. An aggravated assault does not necessarily mean one accompanied by grievous bodily harm—it may mean one of an insulting character, *e. g.* spitting at a person.

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HILL, J.—Why should we assume that the Jury found a verdict contrary to the facts, when the verdict they have found is consistent with those facts? Mr. Archbold, in his treatise on Criminal Pleadings, begins with "aggravated assaults." The preamble of sect. 4 of 14 & 15 Vict. c. 19, which provides against inflicting grievous bodily harm, recites that "It is expedient to make further provision for the punishment of aggravated assaults." No one exercising his common sense can have any doubt as to the meaning of the word.

CHANNELL, B.—The statement before us enables us to construe what the Jury meant by an aggravated assault.

CROMPTON, J.—We must take the verdict with reference to the subject-matter of the charge, and what was left to the Jury.

Huddleston.—The Jury may, consistently with the facts, have intended not to find the prisoner guilty of intending bodily harm, but only of an aggravated assault. The Recorder did not tell the Jury that "bodily harm" and an aggravated assault were the same thing. The jury have not found what is really the ingredient in an assault with intent to do grievous bodily harm. Secondly, the Jury having found that the assault was without premeditation, and under the influence of passion, the verdict of guilty ought not to be entered on the first set of counts. As malice is the distinction between murder and manslaughter, so here it is the distinction between grievous bodily harm and a common assault. So in arson malice is necessary to constitute the crime.

HILL, J.—You make no distinction between "premeditation" and "intention," between intentionally doing an unlawful act and causelessly doing it.

CROMPTON, J.—Here I think we must take it that the prisoner intended to do the act.

Huddleston.—The word "maliciously" is used in the statute, which means something more than intentionally.

Ballantine, Serj. (*Adams and O'Brien* with him) for the prosecution, was not called upon.

ERLE, C.J.—We are of opinion that the conviction ought to be

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affirmed. The objection is made to the language in which the Jury returned their verdict: "We find the defendant guilty of an aggravated assault, but without premeditation. It was done under the influence of passion." It is very rare indeed to meet with language which cannot be perverted. We must construe the language used by the Jury by looking at the circumstances under which the verdict was returned. We think it clear that the Jury intended to find the prisoner guilty on the counts charging an intent to do grievous bodily harm. The question was raised, whether the prisoner committed the assault with intent to do grievous bodily harm. The intent was discussed and an explanation of what the statute meant given by the Recorder, and then the Jury say, "We find the prisoner guilty of an aggravated assault." It is impossible, to my mind, for any one to have entered anything on the record in respect of that finding other than what has been entered. It was further contended that this finding was a negative of some ingredient necessary to constitute the offence of "grievous bodily harm;" and so disproves that the party intended to commit the crime of grievous bodily harm. But that is not so. We are all of opinion that the assault was intentional in the understanding of the law, though the Jury have found that it was without premeditation and under the influence of passion. We therefore think that the verdict authorised the Recorder in entering a verdict of guilty on the first set of counts.

The rest of the Court concurring,

*Conviction affirmed.*

## NORTHERN CIRCUIT.

## LIVERPOOL SUMMER ASSIZES.

August 10, 1860.

(Before MARTIN, B.)

REG. v. THOMAS WINSLOW. (a)

*Murder—Evidence—Felonious poisoning—Proof of by evidence of other deaths by similar poison in same family.*

*On an indictment against the prisoner for murdering A. J. evidence is not admissible that three others in the same family died of similar poison, and that the prisoner was present at all the deaths, and administered "something" to two of these patients.*

THE prisoner was indicted for the murder of Ann James, under the following circumstances:—

Ann James was the keeper of an eating-house in Liverpool, and the prisoner was her manager. In 1859 she had living in the house with her, her sister Mrs. Townsend, three nephews, William, Thomas and Martin Townsend, and was visited from time to time by a married niece, Jane Cafferata, and her husband, Henry Cafferata. Between September 1859 and February 1860, Mrs. Townsend, William and Thomas Townsend successively sickened and died after a very short illness, which, in each case, exhibited exactly similar symptoms. In February Mrs. James, who had long been ill, became worse and so continued until June when she died, during her illness suspicion was awakened as to its cause, and on her decease the body was opened and a *post-mortem* examination made, the result of which was that although she had been suffering from cancer of the coecum, there were in addition found traces of a sufficient quantity of antimony to have caused death.

Upon this being discovered inquiries were made as to the other deaths, the other bodies were exhumed, and were all found to be saturated with antimony.

(a) Reported by R. D. M. LITTLER, Esq., Barrister-at-Law.

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Evidence was given before the stipendiary magistrate establishing in his opinion a *prima facie* case as to all four deaths as against the prisoner, and he was accordingly committed for trial.

At the summer assizes he was indicted, but for the murder of Ann James only.

*Bliss*, Q.C. (Attorney-General of the County Palatine of Lancaster), *Aspinall* and *Leofric Temple*, were for the prosecution.

*Digby Seymour* (Q.C. in the County Palatine), *Little* and *Joseph Fenwick*, for the prisoner.

Before the trial *Bliss* intimated to the prisoner's counsel that he proposed calling evidence on the indictment for the murder of Ann James which would have reference to the other three deaths.

As the attempt to put in such evidence would, even if unsuccessful, have tended to prejudice the minds of the jury if the discussion took place in their hearing, it was agreed, with the permission of Martin, B., that the arguments *pro* and *contra* should be put into writing by counsel, and that he would give his decision in private.

The following is a copy of the arguments on both sides:—

MY LORD,

The principal grounds upon which I should propose to give evidence of the three other deaths by antimony are:—

1st. To exclude the supposition of an accidental poisoning in the present, the fourth case.

2nd. To show the prisoner had then antimony in his possession, but this we can only do by showing that he administered *something* to two of them, and that antimony is found in them, and that they died of it.

3rd. In order to exculpate Mrs. Cafferata, whom the prisoner charges with poisoning the deceased, it seems material to show that she could not by any possibility have poisoned one of those other three who have so recently died of the same poison in the same family.

4th. As it would be competent to the prisoner to show that when all the others sickened and died he was absent and could not have poisoned them, so evidence may be given against the prisoner that he poisoned the whole, from the four crimes being so connected as to be substantially but one transaction, with reference to the present question.

The 4th of the above grounds puts the question in its extreme terms, but such, however, as seem to follow if the 3rd ground is to prevail. Both of them would be most conclusive of the guilt or innocence of the persons concerned, and can that which is most conclusive be excluded from the evidence? If, however, your Lordship should dissent from the three last grounds, the first is submitted as sufficient, so far at least as to warrant evidence that the other three died of antimony, and one of them in the absence

of Mrs. Cafferata, without proving or suggesting that the prisoner administered anything to them, or had anything to do with their death.

I am, my Lord,

Very respectfully yours,

HENRY BLISS.

Northern Circuit,  
Liverpool, 17th Aug. 1860.

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Liverpool, 18th Aug. 1860.

MY LORD,

The Attorney-General has kindly allowed me to peruse the grounds upon which he contends that evidence relating to the three other deaths would be admissible on the trial of the pending indictment against Winslow.

I respectfully submit that none of those grounds are tenable.

From the limited opportunity which I have here of referring to the authorities, I think the cases in which other felonies prior or subsequent to the particular act charged have been admitted in evidence range themselves under one of the following heads:—

1. Where the several felonies are all parts of one entire transaction.
2. In an exceptional class of cases where guilty knowledge must be proved.
3. Where the other felonies are the direct acts of the accused, and tend to show *malice* in the particular act itself, and as against the individual prosecuting.

I think the authorities do not support the Attorney-General.

But more particularly,

As to the 1st ground:

Such evidence would not exclude the supposition of accident in Ann James's case, unless direct proof could be given respecting the administration of antimony by the prisoner not only to Mrs. James, but to the other three. If even the other three were wilfully poisoned by *some one*, it is no proof *as against the prisoner* on the present charge that Mrs. James's death was not accidental.

As to the second:

*First.* The mere fact of "*something*" being in the prisoner's possession, and of antimony being found in the other bodies cannot be proof of the possession of *antimony* by the prisoner at the time of Mrs. James's death.

*Secondly.* It is quite consistent with such proof that the "*something*," whatever it was, was exhausted in the three former poisonings. This consideration distinguishes the present from such a case as that of several acts being alleged to have been done by a weapon, which is produced and charged to have been used in the particular case by the prisoner.

As to the third:

Mrs. Cafferata is not on her trial, and evidence to anticipate an

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assumed defence inculcating her would be wholly collateral, unless the prisoner produced evidence to exculpate himself by establishing her guilt. The prisoner's defence may inculcate others, are they also to be allowed to call evidence to prove their innocence? If so, where is a trial for murder to conduct to?

Further. To negative that Mrs. C. poisoned A., B., or C. is not proof that she did not poison D.

As to the fourth:

I dispute the hypothesis on which the proposition rests.

I think it would be clearly inadmissible for the prisoner on his trial for murdering D. to prove that A., B., and C. died by similar poison, and that he did not administer it.

On the whole, whatever effect the proposed evidence might have in a moral view, I submit that legally it is inadmissible, and if admitted must tend to prejudice and endanger the prisoner on this trial.

I am, respectfully yours,

W. DIGBY SEYMOUR.

MARTIN, B. (after consulting Wilde, B.), determined not to admit the evidence. The prisoner was accordingly tried on the evidence as confined to Ann James's death, and

*Acquitted. (b)*

(b) It will be observed that this decision is exactly the opposite of that in *Reg. v. Geering* (18 L. J., M. C. 215), where Pollock, C.B., held (Alderson, B. and Talfourd, J. concurring), that such evidence was admissible.—*REP.*



## COURT OF CRIMINAL APPEAL.

November 10, 1860.

(Before ERLE, C.J., CROMPTON, J., CHANNELL and  
BRAMWELL, BB., and HILL, J.)

REG. v. TIMMINS. (a)

*Abduction—Taking away an unmarried girl out of her father's possession*  
—9 Geo. 4, c. 31, s. 20.*Upon the trial of an indictment under 9 Geo. 4, c. 31, s. 20, for taking an unmarried girl, under sixteen, out of the possession of her father, and against his will, it was proved that the prisoner (with whom the girl had previously stayed out for a night) met her by arrangement, and stayed with her away from her father's house for three days, sleeping with her at night, that he took her away without the father's consent in order to gratify his passions, and then allow her to return home, but not with a view of keeping her away from her home permanently :**Held, that the evidence justified a conviction under the above enactment.***C**ASE stated for the opinion of this Court by the Common Serjeant of the city of London:—

The prisoner was indicted at the September Sessions, 1860, holden for the jurisdiction of the Central Criminal Court, under the statute 9 Geo. 4, c. 31, s. 20, "for that he, on the 19th of August, 1860, at the parish of All Saints Poplar, did unlawfully take and cause to be taken one Ann Butler, an unmarried girl under the age of sixteen years, to wit, of the age of fourteen years and five months, out of the possession and against the will of Isaac Butler her father, he the said Isaac Butler then and there having the lawful care and charge of her, against the form of the statute, &c., and against the peace," &c.

The statute enacts "that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such person shall be guilty of a misdemeanour."

It was proved on the trial, that on the 17th of August the

(a) Reported by J. THOMSON, Esq., Barrister-at-Law.

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%  
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prisoner, who is a married man living with his wife, asked the girl Ann Butler, if she would mind going out with him on the Sunday, to which she answered "No." He was previously well known to her, and she had on a former occasion stayed out and slept with him for a whole night, away from her home.

On Sunday the 19th of August, in fulfilment of her engagement, she went and met the prisoner near Poplar Church. They went to London together, and spent three days in visiting places of public entertainment, sleeping together at night, and on Wednesday morning, the 22nd of August, on getting up, the prisoner said to her, "I'll go to work, and you go home." They then separated, and the girl went home.

The father of the girl swore, that his daughter was absent without his knowledge, and against his will.

In answer to questions which I left to them, the jury found that the father did not consent, and that the prisoner knew he did not consent; and that the prisoner took the girl away from him in order to gratify his passions, and then allowed her to return home, but not with a view of keeping her away from her home permanently.

Upon this finding I postponed the judgment, in order to have the opinion of the Court on the case, and the question for the opinion of the Court is, whether, on the facts so found, any offence has been committed under the statute?

THOMAS CHAMBERS,  
Common Serjeant.

No counsel appeared for the prisoner.

*Sleigh* (for the prosecution).—It is submitted that the conviction was proper. The 20th section of the 9 Geo. 4, c. 31, upon which the indictment is framed, is to be read in connection with sects. 19 and 21. Sect. 19 provides for the case of a person, from motives of lucre, taking away, or detaining any woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person. And sect. 21 provides for the leading, taking away, decoying or enticing away or detaining any child under the age of ten years, with intent to deprive the parents or lawful guardians of such child of the possession of such child, or to steal any article about the person of the child. In sect. 20 the unlawfully taking away any unmarried girl under sixteen years of age, out of the possession and against the will of her parents, is made an offence, *per se*, and the intent is immaterial.

CROMPTON, J.—Suppose a person takes a girl away from her parent's possession for the purpose of educating her in another religion, does that come within the 20th section? Or if a man make a sign to a girl in her father's cottage, and she comes out and goes away with him for a short time, would that be within the section? Is it not that a question of degree?

*Sleigh*.—Under some circumstances the cases put would fall

within the meaning of sect. 20, which was passed to protect the sacred rights of parents over unmarried girls under sixteen. Any act by which all care and control on the part of the father is determined, is sufficient, according to the judgment in *Reg. v. Manktelow*, (6 Cox Crim. Cas. 143; 22 L. J. 115 M. C.). In *Reg. v. Meadows* (1 Car. & Kir. 399), where one girl persuaded another, under sixteen, to leave her home and accompany her to London, it was held not to be a case within the section, otherwise any two school girls playing truant in company might have been indicted respectively each for abducting the other.

CROMPTON, J.—In *Reg. v. Manktelow* the parties went away without any intention of returning.

*Sleigh*.—That was so. If the taking away severs the possession of the parents, that is all the statute seems to contemplate. If the girl was sixteen years old all but one day, and a party takes her out of the possession of her parents, the statute would certainly apply.

BRAMWELL, B.—What is the meaning of “possession of the father?”

*Sleigh*.—Where the act is to sever the possession, so that he no longer has the care and control of his daughter, and is against the will of the father, it falls within the section. It may be that each case must be judged by its own facts, and if so, here it is submitted the evidence was sufficient to bring the case within the enactment. In *Reg. v. Hopkins* (Car. & M. 264), where a man by falsely representing that he wished to place the girl in the service of a lady, induced the parents to allow him to take her away, Gurney, B., ruled that the case was within the statute. The legislature intended, that an unmarried girl under the age of sixteen, should be protected against all persons who should take her out of the possession, and against the will of the parents, whether for a long period or a short one.

ERLE, C.J.—We are of opinion that this conviction ought to be affirmed. The statute was passed for the protection of the parental right, and for preventing unmarried girls from being taken out of the possession of their parents against their will. It enacts that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanour. It is clear law that any deception or forwardness on the part of the girl in such cases, will not prevent the person taking her away, from being guilty of the offence created by this enactment. The difficulty in the construction of the statute is, what is meant by taking a girl out of the possession of her father? The taking a girl away might be consistent with the possession of the father if the girl goes away with the party, intending to return in a short time; but where a person takes a girl away from the possession of the father, and keeps her away against his will for such a length of time as in

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*Abduction.*

this case, keeping her from her home for three nights, and cohabiting with her during that time, we think that the evidence justified the jury in finding that the prisoner took the girl out of the possession of the father and against his will, within the meaning of the statute. The prisoner took the girl away from under her father's roof, and placed her in a situation quite inconsistent with the existence of the relation of father and daughter. Our judgment in this case is, that there was evidence which justified the conviction—which we consider to be the point submitted to us—although the prisoner did not intend to keep her away from her home permanently, but when his lust was gratified to cast her from him. We limit our judgment to the facts in this particular case. It may be that a state of facts might arise upon which the offence would be complete in law when the girl passed the threshold of her father's house, as when she is taken away with the intention of keeping her away permanently. We do not mean to say that a person would be liable to a conviction under this section, if it should appear that the taking was intended to be of a temporary nature only, or for the purpose of taking a girl and placing her in some situation not inconsistent with the relation of father and child. It is sufficient for us to say that there was evidence in this case which justified the conviction.

The rest of the Court concurring,

*Conviction affirmed.*

[See the next case.]

## COURT OF QUEEN'S BENCH.

November 23, 1860.

(Before COCKBURN, C.J., HILL and BLACKBURN, J.J.)

EX PARTE BARFORD. (a)

*Parent and child—Father's right to custody — Child under sixteen—  
Habeas corpus.*

*A father, if there be no disqualifying cause, has a right to the custody of a female child up to the age of sixteen, although she be unwilling to live under his care and control.*

*As to how far parties interfering to keep a girl from the possession of her father render themselves liable to be indicted for misdemeanour, vide the judgment in this case.*

**I**N this case the Court had granted writs of *habeas corpus* directed to John Howse and Rachael Hopkins, to bring up the body of Charlotte Barford, a young lady aged fifteen years, in order to her being delivered up to her father who obtained the writs.

From the different affidavits on the part of the prosecutor, it appeared that the young girl left her father's house, at St. Albans, at the beginning of November last, and Howse alleged that, at the request of the girl's stepmother, he took charge of her, and kept her at his house in London for some days. Howse was afterwards seen with her at the house of a Mr. Herrington, in Arabella-row, Pimlico, on the 10th of November. The *habeas corpus* was granted on the 13th of November, and Howse's affidavits alleged that the girl left his house on the 15th ensuing to go to the house of Mrs. Crawford, her aunt, and that he had since learned that she had left Mrs. Crawford's by direction of her stepmother, to go to the house of a Miss Hopkins, her stepmother's sister, who lived at St. Albans. A writ of *habeas corpus* was then directed to Miss Hopkins. Several unsuccessful attempts were made to serve the writ upon Miss Hopkins, and ultimately the Court granted

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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rules *nisi* for attachments for contempt against Howse and Miss Hopkins.

The young lady was this day produced on return to the writs, and the question was then raised as to whether she was of an age to exercise a discretion as to whether she would return home to her father, or whether the father had not an absolute right to have his child delivered up to him by the order of the Court.

*Sleigh*, on the part of the father, moved that the young lady, now in Court, should be delivered up to her father, and read an affidavit in which the father stated all the circumstances under which his daughter had been withdrawn from his roof, and taken to London by Howse, and sent about to various places after the writ of *habeas corpus* was granted. The affidavit concluded with a statement that the applicant had always treated his daughter with the greatest kindness, and that his object was to save his daughter from the improper hands and society into which she had fallen.

*D. Seymour* said he had not had an opportunity of answering the affidavit; and as to the motion made that the girl should be delivered up, he submitted she was quite of age to speak for herself.

COCKBURN, C.J., then directed that the girl should be taken into his private room, and said the counsel on both sides might accompany her, if they wished.

The parties then all withdrew, and were absent from the Court for some time. Upon their lordship's return.

COCKBURN, C.J., said he wished to hear counsel upon the question of law, whether the father was entitled to have the child delivered up to him.

*Sleigh* then referred to the repealed statute, 4 & 5 Phill. & M. c. 8, s. 2, which enacted "That it shall not be lawful for any person or persons to take or convey away any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession, custody, or governance, and against the will of the father of such maid or woman child, or of such person or persons to whom the father of such maid or woman child by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give, or grant the order, keeping, education, or governance of such maid or woman child. Excepting such taking and conveying away as shall be had, made, or done, by or for such person or persons as without fraud or covin be or then shall be the master or mistress of such maid or woman child, or the guardian in socage, or guardian in chivalry of or to such maid or woman child." That statute was in substance re-enacted by the 20th section of the 9 Geo. 4, c. 31, now in force, which enacted that, "If any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen, out of the possession, and against the will of the father or mother or of any other person having the lawful care or charge of her, every

such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or both, as the court shall award." The learned counsel contended that the statute assumed and recognized the right of the father to have the custody of his daughter up to sixteen years of age; but he went further and contended that, under the 12 Car. 2, c. 24, s. 8, the father had the right to the custody of his children until they were of the full age of twenty-one years. The words of the statute were, "That where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child, or children, whether born at the time of the decease of the father or at that time *en ventre de sa mere*, or whether such father be within the age of twenty-one years or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession, or remainder, other than Popish recusants." &c. He also referred to the case of *R. v. Greenhill* 4 Ad. & Ell. 624).

COCKBURN, C.J., said the difficulty was in fixing the age at which the child was too young to exercise a choice.

HILL, J., said the law was now settled that, though the girl was a consenting party, and left her father of her own free will, she had no mind or will of her own that could infringe on her father's parental right. His lordship referred to the case of *Reg. v. Manteklow*: (6 Cox Crim. Cas. 143; 22 L. J., M. C. 118.)

COCKBURN, C.J., said the Court had examined the girl herself, and she had every opportunity of explaining; but the result of the examination was that she could not suggest any misconduct on the part of her father which would justify her in leaving his house.

HILL, J., said the question was whether, if the girl chose to set her father's authority at defiance she could do so?

*D. Seymour* said he appeared for Howse, and also for Miss Hopkins, and that, if he had the opportunity, he thought he could answer the father's affidavit, and show that his was not the proper custody.

COCKBURN, C.J., said that ought to have been done on the return to the writ, and he should be very reluctant to give an opportunity of stating in an affidavit charges which the girl herself, when examined, had not preferred.

*D. Seymour* referred to the authorities, and contended that the girl was old enough to exercise her choice, and that the Court would not control her.

BLACKBURN, J., referred to *Ratcliffe's* case (3 Co. 39 a), and Fraser's note thereon.

COCKBURN, C.J. also referred to the recent case of *Reg. v.*

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*Timmins* (*ante*, p. 401), and after consulting with the other judges, said no case had been made out on the part of those who resisted the application to the Court that the child should be delivered up to the care of her father. It was for them to show that, though entitled in point of law to the custody of the child, the father ought not, in regard to the interests of the child, to have that custody. The question was, therefore, a simple question of law, whether the father was entitled to the custody of the child, she being fifteen years of age, when that daughter, without any adequate or justifying cause, desired to withdraw herself from his parental care and control; for, unhappily, it was not to be disguised that the unfortunate girl was, he feared, influenced by evil counsels and evil examples, and was desirous, without adequate motive, to withdraw herself from the care and affectionate control of her father, and cast herself on those by whom she was likely to be misled, to perhaps her eventual destruction, and if the Court could save her from what her folly would lead her into, they would rejoice. The cases go to this length, that, though the father is entitled to the custody of his child up to twenty-one years of age, the courts will not interfere summarily, by writ of *habeas corpus*, to withdraw the child from the custody in which she happens to be, if the child has arrived at the age of discretion at which she can exercise a choice. The question is, what was the age at which the child attained that discretion? He (Cockburn, C.J.) wholly repudiated, as fraught with the most dangerous consequences, the doctrine that mental intellectual prococity would give her the right, if the child had not arrived at the age of discretion which the law recognised, for that very prococity might be the thing of all others to lead a young girl into misery and danger. The Court must lay down a general rule as to the age when the minor might be left to freedom of choice. The Legislature had thrown light on this subject, by which the Court might be safely guided. The age of sixteen had been pointed out as the age up to which the consent of a female child should not justify her withdrawal from the father's roof without its being considered a misdemeanour. The Court may therefore safely act upon the rule that the age of sixteen is that up to which a female child ought to be subject to parental control. Up to that period no encouragement was afforded by the law, any more than by public opinion, to induce a young woman to withdraw herself from the parental control. In the present case there was nothing to justify that withdrawal, and the result was, that the Court would order that the girl be delivered up to her father. His Lordship stated that he would also add, that if the persons who had done their best to baffle the exertions of this Court had been indicted under the statute 9 Geo. 4, c. 31, s. 20, no one could doubt that they would have been liable to be convicted of the offence. How, then, could the Court allow the girl to remain in their custody? The order, therefore, would be that she should be restored



to her father; but his Lordship warned the parties to take care for the future, lest they should bring themselves within the law. His Lordship concluded by observing that the Court had not come to this conclusion without great consideration, nor without consulting with the judges of the other courts, all of whom were unanimous in opinion with the judges of this Court.

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The rest of the Court concurred.

[See the case of *Reg. v. Timmins*, ante, p. 401.]

## WESTERN CIRCUIT.

WINTER ASSIZES, 1860.

*Winchester, December 10.*

(Before Mr. Justice Byles,)

REG. v. ANSELL.

*Forgery—Post-office order.*

*Query—Is the signature to a post-office order, required to be made by the payee previously to the receipt of the money, the signing of a receipt or of an order?*

**P**RISONER was indicted for forging a receipt purporting to be given by the Postmaster at Portsmouth, with intent to defraud William Clegg.

*Poulden and Cole*, for the prosecution.

It was proved that William Clegg's mother had sent from Oldham a post-office order for £l. to her son, who was a private in the 11th regiment, stationed at Portsmouth. The letter enclosing the order reached Portsmouth on September 13th. Sergeant Murphy received the letters from the post-office for the regiment, and delivered most of them; that which was addressed to Clegg, who was out, he left in his room and went away. This letter was taken by some person before Clegg's return. On the same day

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the prisoner went to the post-office and there produced the order, asking for payment of it. The clerk told him that he must first sign it, and thereupon the prisoner signed the name "William Clegg," and received the 1l.

BYLES, J.—I have some doubt whether this is properly described as a receipt for money. Is it not in truth an order for the payment of money?

*Poulden*, for the prisoner, submitted that it was in substance a receipt, and had been always so treated. There was an order on the back directing the payee to sign *the receipt on the other side*. It was in fact the acknowledgment by the party receiving the money that he had so received it.

BYLES, J.—As it has been hitherto taken to be a receipt, I shall so receive it; but feeling much doubt about it, I will consider it, and if that doubt should not be removed, the prisoner shall have the benefit of it in a reservation of the point for the Court of Criminal Appeal.

*Verdict, Guilty.(b)*

(b) If a receipt, it would be subject to the receipt stamp, and we are not aware of any special exemption of post-office orders.

## COURT OF CRIMINAL APPEAL.

November 10, 1860.

(Before ERLE, C. J., CROMPTON, J., CHANNELL and  
BRAMWELL, BB., and HILL, J.)

REG. v. THOMAS NEWALL HOLT. (a)

*False pretences—Evidence of guilty intent.*

*The prisoner was charged with obtaining a specific sum from W. by false pretences. It appeared that he was employed by his master to take orders, but not to receive moneys, and he was proved to have obtained the specific sum from W. by representing that he was authorised by his master to receive it. Evidence was then admitted of the prisoner's having within a week from the above obtaining, obtained another sum of money from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way:*

*Held, that such evidence was not admissible for the purpose of proving the intent of the prisoner when he committed the acts charged in the indictment.*

CASE reserved for the opinion of this Court by the Chairman of the General Quarter Sessions of the Peace for the West Riding of the County of York, holden at Leeds on the 15th of October, 1860.

The defendant T. N. Holt was tried on an indictment charging him with the misdemeanour of having obtained the sum of 9s. 9d. from William Hirst by false pretences.

It appeared in evidence that the defendant was employed on the 19th of April by one Luke Uttley to take orders for goods, but was not authorised, but forbidden, to receive money on behalf of Luke Uttley, nor did he at any time pay over or account for any moneys received to Luke Uttley; that on the 30th of April the defendant obtained from W. Hirst the sum of 9s. 9d. charged in the indictment, by the representation that he was authorised by the said Luke Uttley to receive that sum on his behalf for goods delivered in pursuance of an order taken by the defendant.

The counsel on behalf of the prosecution tendered the evidence

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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of one Samuel Uttley, to the effect that on a day not specified, but within a week from the said 30th of April, the defendant obtained from him the said S. Uttley the sum of 11s. by a like representation that he (the defendant) was authorised by the said Luke Uttley to receive money on his behalf for goods delivered, in pursuance of a like order taken by the defendant, such last-mentioned obtaining not being charged, or in any way referred to in the indictment.

The counsel for the prisoner objected that the evidence so tendered was inadmissible.

I held, as Chairman, however, that such evidence was admissible, for the purpose of proving the intent of the prisoner when he committed the acts charged against him in the indictment.

I therefore received the evidence, but reserved the question whether it was properly admitted for the opinion of the Court of Criminal Appeal.

The prisoner was convicted, and sentence of imprisonment for four calendar months in the house of correction at Wakefield, with hard labour, was passed upon him, and he is now admitted to bail to render himself in execution.

The question for the Court of Appeal is,

Whether the evidence of Samuel Uttley was or was not rightly admitted?

E. B. W. BALME, Chairman.

No counsel appeared to argue on either side.

ERLE, C.J.—This conviction must be quashed. In the statement of the case submitted to us we cannot find any facts that would warrant us to say that the evidence was admissible,

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*January 19, 1861.*

(Before COCKBURN, C.J., WIGHTMAN and WILLIAMS, JJ.,  
BRAMWELL, B., and KEATING, J.)

REG. v. GEORGE BRUMMITT.

*Larceny—Lead fixed to a building—Evidence of ownership.*

*Proof by an agent, of the receipt of rents, of letting the premises, ordering the repairs and managing the property generally on account of A. B., is sufficient evidence of title in A. B., without producing the title-deeds, upon a count in an indictment for stealing lead, the property of A. B. fixed to a dwelling-house of the said A. B.*

CASE reserved for the opinion of this Court by the Chairman at the West Riding of Yorkshire Epiphany Sessions 1861.—

The prisoner was tried before me at the Christmas General Quarter Sessions of the Peace for the West Riding of the county of York, holden at Wakefield on the 1st of January, 1861, on an indictment which charged him on the first count with feloniously ripping, stealing and carrying away thirty-one pounds weight of leaden piping, the property of John Hope Shaw and others, then and there being fixed to a dwelling-house of the said John Hope Shaw and others.

On the second count with feloniously receiving the same.

On the third count with stealing thirty-one pounds weight of leaden piping, the property of Thomas Wood, then and there being fixed to a dwelling-house of the said Thomas Wood.

On the fourth count with feloniously receiving the last-mentioned lead.

The jury found a general verdict of guilty, and the prisoner was sentenced to nine calendar months' imprisonment with hard labour; but was admitted to bail until the opinion of the Court of Criminal Appeal could be had on the following case.

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—  
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John Barff, a justice of the peace, proved that he managed the property from which the lead in the third count of the indictment was stolen, for his nephew Thomas Wood, who resided in Patras; that he ordered all repairs, received the rents in his nephew's absence, and let the property to Mr. Waite, the present tenant; that prisoner called upon him on the Thursday morning before the robbery, and said he was repairing Captain Binstead's (a neighbour's) house, and that the spouts of Mr. Waite's house were out of repair, and asked witness's leave to repair them, as he could do it cheaply; that witness refused, and said that he should order his own workmen to do the work, if repairs were required.

Counsel for the prosecution proposed to ask Mr. Barff whether Thomas Wood was owner of the premises in question.

The counsel for the prisoner objected to this question, on the ground that the ownership would appear from the title-deeds, the best attainable evidence, as the deeds might show the property to be in trust for Mr. Wood, or that the mortgagee had the legal title; in either of which cases Mr. Wood might not be the legal owner, and these inferences were consistent with the evidence of Mr. Barff; or Mr. Wood might be himself an agent merely of a third party, Mr. Barff acting for him in his absence.

The evidence of ownership of John Hope Shaw and others to the property in the first count mentioned was held by the Court to be insufficient. And the Court held, that the evidence as to the ownership of Waite's house was sufficiently proved to be in Thomas Wood.

The opinion of the Court of Criminal Appeal is requested, whether the evidence of Mr. Barff was sufficient to prove the ownership of the property in Thomas Wood the prosecutor?

J. G. SMYTH, Chairman.

*Campbell Foster*, for the prisoner, applied to have certain evidence given at the trial, which the chairman of the sessions had declined to insert, and which it was contended showed conclusively that the property was not in Thomas Wood, added to the statement of the case.

COCKBURN, C.J.—There is abundant evidence set out to show that the property is well laid to be in Thomas Wood. The objection is purely of a technical nature, and you now ask us to assist you in raising it by an amendment. We refuse to do so.

*Campbell Foster*.—The evidence of ownership is not sufficient. There was some evidence at the trial that Wood was not the owner, and that Barff was merely the conduit pipe through which the rents were received.

WIGHTMAN, J.—Where do you find it in this case?

COCKBURN, C.J.—The objection is altogether beside the merits of the case. The prisoner stole the lead, and there is evidence before us that Wood was the owner.

WILLIAMS, J.—There is enough evidence of title to support an action of ejectment, and why not this conviction?

*Campbell Foster*.—In *Rex v. Hutchinson* (R. & R. 412), upon an indictment for stealing goods from a dissenting chapel, the second count described them as the property of a person who was employed to take care of the chapel, kept the keys of the chapel, and received a salary for so doing; and it was held that the goods could not be considered as belonging to the chapel-keeper, who was no more than a mere servant. So in this case it may be inferred that Barff and Wood were not the owners, but acted only as the agents for the owners.

*Waddy*, for the prosecution, was not called upon to argue.

COCKBURN, C.J.—It appears to me that there is only one inference to be drawn from the circumstances stated. On the evidence before us the property appears to be well laid in Wood. The receipt of rents is *prima facie* evidence of a seisin in fee. A man is not bound in such a case to produce his title-deeds. The point is too clear for argument.

The rest of the Court concurring,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*January 19, 1861.*(Before COCKBURN, C.J., WIGHTMAN and WILLIAMS, JJ.,  
BRAMWELL, B. and KEATING, J.)

REG. v. HENRY MOORE. (a)

*Larceny—Finding property—Appropriation—Felonious intention.*  
*The prosecutor went into the prisoner's shop to have his hair cut, and he also made a purchase. His purse, containing notes and gold, was in a coat, which was laid on a chair while his hair was being cut; he made the payment from the purse, and then left the shop, and next morning he missed a 10l. note from his purse. The jury found that the note was dropped by the prosecutor in the shop, and that the prisoner found it, and that at the time he picked it up, the prisoner did not know, nor had he reasonable means of knowing who the owner was, but that he afterwards acquired knowledge of who the owner was, and after that converted the note to his own use; that the prisoner intended, when he picked up the note in the shop to take it to his own use, and deprive the owner of it, whoever that owner might be, and that the prisoner believed at the time he picked up the note that the owner could be found: Held, that upon this finding the prisoner was guilty of larceny.*

CASE reserved for the opinion of this Court by Mr. Commissioner Kerr, at the Central Criminal Court:—

At a session of the Central Criminal Court, holden on the 26th day of November, 1860, Henry Moore was tried before me, on an indictment charging him in the first count with stealing a Bank of England note for 10l. the property of David McGregor, and in the second count with receiving the same, knowing it to have been stolen.

It appeared from the evidence, that the prosecutor went to the shop of the prisoner to have his hair cut, which was done by the prisoner; that the prosecutor before leaving, purchased some hair-oil, and then left the shop. When he went to the prisoner's shop, the prosecutor had in a clasped purse in the pocket of his great coat, which he carried on his arm, two 10l. notes (one of them the subject of the indictment) and some gold. He folded his great

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.



coat and laid it on a chair, while his hair was being cut, and he paid for the hair-oil from the purse in which the notes and gold were.

Next morning he discovered the loss of the 10*l.* note, alleged to be stolen, returned to the prisoner's shop, stated to the prisoner his belief that he had lost it in the shop, and offered him a reward of 3*l.* if he would restore it. The prisoner told the prosecutor he knew nothing of the note, but in his statement before the magistrate he explained that he had given gold for the note, the same day that the prosecutor lost it, but was afraid to explain this to the prosecutor lest he should be obliged to give up the note to him.

Evidence was called in support of the prisoner's statement, that he had given gold for a 10*l.* note, about the time of the loss by the prosecutor, to a man in his (the prisoner's) shop, and it was proved that the prisoner, on the same day when the prosecutor inquired after the note, parted with it.

The jury found the prisoner guilty, but recommended him to mercy, on the ground that they believed that the note was dropped in the shop, and found by him there.

Mr. Best, counsel for the prisoner, then contended that if the jury believed the prisoner to have found the note, they ought to acquit.

Whereupon I put certain questions to the jury, in answer to which they found—

First, that the note was dropped by the prosecutor in the shop, and that the prisoner found it there.

Secondly, that the prisoner at the time he picked up the note did not know, nor had he reasonable means of knowing, who the owner was.

Thirdly, that he afterwards acquired knowledge of who the owner was, and after that he converted the note to his own use.

Fourthly, that the prisoner intended when he picked up the note in the shop to take it to his own use, and deprive the owner of it, whoever that owner might be.

Fifthly, that the prisoner believed at the time he picked up the note that the owner could be found.

I thereupon directed the verdict of guilty to be entered of record, and reserved for the opinion of this Court the question, whether, upon the above findings, the prisoner was properly convicted.

The prisoner remains in gaol awaiting judgment.

R. MALCOLM KERR,

One of the Commissioners of the Central Criminal Court.

8th of January, 1861.

*Sleigh*, for the prisoner.—It is submitted that this conviction ought to be quashed. In order to convict the prisoner of larceny, it was essential to prove these two ingredients: first, that the prisoner intended at the very time he took up the bank-note to

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appropriate it to his own use; and secondly, that he had then the means of knowing who the owner of it was. The merely taking up lost property, although with the intention to appropriate it, is not sufficient.

*Larceny—Property found.* COCKBURN, C.J.—Your difficulty is, that the prisoner knows who the owner is before he converts the note.

*Sleigh.*—That does not make it a felonious conversion. In *Reg. v. Thurborn* (1 Den. C. C. 387, S. C. nom. *Reg. v. Wood* (3 Cox Crim. Cas. 453), it was held that the knowledge, or means of knowledge, as to the owner must be co-existent with the fact of finding. A mere belief in the mind of the prisoner that the owner can be found is not enough. In *Reg. v. Dixon* (1 Dearsley C. C. 580; S. C. 7 Cox Crim. Cas. 35), where one question left to the jury was, whether at or after the time of the finding the prisoner believed that there was not reasonable probability that the owner could be traced; and the jury answered that they were of opinion that the prisoner did believe that the owner could be traced; Jervia, C.J., said: "It does seem to me that it was left to the jury to speculate upon what was in the mind of the man, without any facts to support that speculation." The conviction was therefore held bad.

WIGHTMAN, J.—In the present case the prisoner, at the time of finding the note, makes up his mind to deprive the owner, whoever he may be, of the property in it, and he does know who the owner actually is, before he converts the note. In *Reg. v. Thurborn*, Parke, B., in the course of his elaborate judgment, says: "If the prisoner had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either." But here the original taking was not innocent.

*Sleigh.*—Whether the original taking was innocent or not, depends upon whether the note was marked or not, or the circumstances of the finding such, that the owner could be traced. It is not like the case where a purse or property has been mislaid, and the owner may probably be expected to come back to look for it. Upon the statement in this case the note is found by the jury to have been absolutely lost. In *Reg. v. Dixon* the jury found that there was a reasonable probability at and from the time of the finding that the owner could be traced, and that the prisoner believed that the owner could be traced. That finding was stronger against the prisoner than the one in the present case, and yet the Court quashed the conviction.

WILLIAMS, J.—In *Reg. v. Thurborn*, Parke, B., put the judgment of the Court favourably for your client, viz., that whether it is a felony or not does not depend upon what is passing in the mind of the finder at all, but he lays it down that where *dominus rerum non apparet*, the subject-matter is incapable of being the subject of larceny.

WIGHTMAN, J.—In the present case you must add that the finder took up the note *animo furandi*.

*Sleigh*.—Even assuming that the prisoner intended at the time of finding the note to appropriate it to his own use, it is not larceny unless he had then the means of knowing who the owner was. In *Reg. v. William Charles Giffard* (52 Central Criminal Court Sessions Paper, 242), the prisoner was indicted for stealing a 10l. bank-note, and the defence was that he found it, and that as there was no mark upon it showing to whom it belonged, his retaining it did not amount to a felony, and Crompton, J., directed the jury that if they considered the prisoner found the note, not knowing whose it was, and not having the means of knowing, it was their duty to acquit him.

COCKBURN, C.J.—Suppose a person finds a valuable diamond necklace—say of 10,000l. value in a ball room, and takes it up intending to keep it, whoever the owner may be, would that not be a larceny?

*Sleigh*.—If at the time of finding, the person had the means of knowledge, it would be larceny; but if he had not the means of knowledge, it would not be larceny. In *Reg. v. Christopher* (1 Bell's C. C. 27; 8 Cox Crim. Cas. 91), the latest case on this subject, it was decided that where a person finds lost property and appropriates it to his own use, it is necessary, in order to convict him of larceny, that the jury should find that at the time he took possession of the property he knew, or had the means of knowing, who the owner was, and took possession of it with the felonious intent to appropriate it to his own use.

WILLIAMS, J.—Suppose a sheep strays into a man's field, and the man takes and eats it, not knowing the owner, is he guilty of larceny?

*Sleigh*.—No.

COCKBURN, C.J.—In *Reg. v. Thurborn*, Parke, B., uses this language: "To prevent the taking of goods from being larceny, it is essential that they should be presumably lost; that is, that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them."

*Sleigh*.—In *Reg. v. Dixon*, where *Reg. v. Thurborn* was cited, the jury found that the prosecutor had not abandoned, and that the prisoner believed he had not abandoned, his right to the money. In *Reg. v. Christopher*, Channell, B., said: "In *Reg. v. Dixon*, in which *Reg. v. Thurborn* was referred to, it was held, that if a man find lost property and keep it, and at the time of finding it have no means—no immediate means—of discovering the owner, he is not guilty of larceny because he afterwards has means of finding him, and nevertheless retains the property to his own use." And Hill, J., said: "Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shown that at the time of finding he had the felonious intent to appropriate the thing to his own use. The

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other ingredient is, that at the time of finding he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner may be found. There must be the *immediate* means of finding him."

COCKBURN, C.J.—The facts were very different to those in this case. Here the prisoner keeps a shop, a customer comes in, takes out his purse, and drops a bank-note out of it; the prisoner must know that the customer will come back to inquire about it. Can it be said that he has not the means of knowing who the owner may be?

*Sleigh.*—There is no finding in this case to support the view just put. Belief which may be unfounded, and means of knowledge, are different things.

WIGHTMAN, J.—Is there any reported case in which all the facts found in this case have been combined? There are cases in which one or other of them have existed separately.

*Sleigh.*—No. Here there is no finding inconsistent with the position that this was lost property.

No counsel appeared for the prosecution.

COCKBURN, C.J.—If the findings in this case do not amount to larceny, the law is more lax than I take it to be.

The rest of the Court concurring,

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 19, 1861.*(Before COCKBURN, C.J., WIGHTMAN and WILLIAMS, JJ.,  
BRAMWELL, B., and KEATING, J.)

REG. v. PHILIP WILLIAM MAY. (a)

*Embezzlement—Clerk or servant—Person collecting orders on commission.**The prisoner was informed by letter from the prosecutors that for all business he did for them he would be allowed a commission. It was his duty to account to the prosecutors for any money he might receive for them immediately on the receipt of it: Held, that upon this evidence, the prisoner was not shown to be a clerk or a servant within the 7 & 8 Geo. 4, c. 29, s. 47.***C**ASE reserved for the opinion of this Court by the Chairman at the Epiphany Staffordshire Sessions, 1861.

At the recent Epiphany Sessions for the county of Stafford, Philip William May was indicted, for that he being the clerk or servant of the Right Hon. Earl of Granville and others, feloniously embezzled on the 1st of August last 94*l.*; and on the 22nd of September, 37*l.* 15*s.*, the money of his employers.

The evidence showed that the prisoner was employed at Newcastle-upon-Tyne, in Northumberland, to obtain orders there for the sale of iron for the prosecutors, who carried on business at Hanley, in Staffordshire, as manufacturers of iron, under the name of the Shelton Bar Iron Company, at a certain commission upon the orders which he should obtain.

This employment took place under a letter from the manager of the prosecutor's works, of which the following is a copy:—

“Shelton Bar Iron Works, near Stoke, Staffordshire,  
“19th Sept. 1859.

“Mr. P. W. May.

“Dear Sir,—In reply to your letter, we are not disposed to appoint any agent at Newcastle, but for all business you do for us, we shall be happy to pay you a commission.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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"We expected that after your conversation with the writer a good business would result.

"Yours truly,

"Shelton Bar Iron Company,

"W. P. RODEN.

"15, Lisle-street, Newcastle-on-Tyne."

The manager of the company, Mr. Roden, was not called as a witness, but the cashier of the company who had nothing to do with the employment of such persons as the prisoner, said that a person who like the prisoner got orders on commission was called an agent in their trade, and that he had no doubt there was some other letter appointing the prisoner an agent for the prosecutors. There was no evidence of, or of a notice to produce any such letter. There was not any evidence to show whether the prisoner was employed for or by any other persons than the prosecutors.

It was his duty to account to them for any money which he might receive for them immediately on receipt of it.

On the 1st of August last, at Newcastle-on-Tyne, he received on account of the prosecutors the sum of 94*l.* from persons to whom he had sold iron for them, and on the 2nd of August wrote from that place to them a letter of business, in which he did not mention the receipt of this sum; and on the 22nd of September last, at the same place, he received another sum of 37*l.* 15*s.* on their account also; and on the 29th of September wrote from the same town another business letter to the prosecutors, in which he did not mention the receipt of this second sum. Being soon afterwards applied to on behalf of the prosecutors for these two sums, he wrote from the same place to them two letters, which they received through the post-office in Staffordshire, and of which the following are copies:

"8, Malton-terrace, Newcastle-on-Tyne,

"Oct. 28, 1860.

"W. S. Roden, Esq.

"Dear Sir,—I am truly sorry and ashamed that I have taken such a liberty as to make use of money received on account of the Shelton Bar Iron Company, but shall in a short time be able to remit the amount; therefore pray of you to pardon such conduct, and prevent any unpleasant proceedings, which I own would be my desert, and at same time to myself and family. I should have replied to your several letters, but have delayed, expecting daily to make up the sum. Hoping that you accede to my request,

"I remain, dear sir, yours truly,

"P. W. MAY.

"P.S.—I enclose Mr. Toward's acceptance, which should have been sent before, but was mislaid on his leaving home, and only returned yesterday."

"8, Malton-terrace, Newcastle,  
"Oct. 31, 1860.

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"Dear Sirs. — I am sorry that such is the upshot of my connection with you. Pray give me a little longer, and my brothers at Smyd Colliery, adjoining you, will no doubt put matters right. If my money does not come in the mean time, legal proceedings would spoil it, and prevent me getting anything. Therefore, as my earnest desire is to replace all, I hope you will not pursue the course that you threaten.

"I note your remarks respecting orders in future, and hope that affairs may ultimately show a better aspect.

"I remain your obedient servant,

"P. W. MAY.

"Messrs. The Shelton Bar Iron Company."

This being the case for the prosecution, it was objected on behalf of the prisoner—

First, that he was not shown to be a clerk or servant to the prosecutors within the meaning of the statute, &c.

Secondly, that no act of receiving or embezzling had taken place within the county of Stafford.

The Court overruled both objections; but on the jury returning a verdict of guilty, postponed passing sentence until the next adjourned sessions, in order that the propriety of such ruling may be submitted to the Court for the Consideration of Crown Cases Reserved.

If either objection was valid, the verdict is to be set aside; if not, the verdict is to stand.

The prisoner is in gaol awaiting judgment.

LICHFIELD,

Chairman of Quarter Sessions.

COCKBURN, C.J.—The point is, whether the defendant was a clerk or servant within the meaning of the statute. This is the case of a person going about and getting orders for the prosecutors, upon which he received a commission. He may be employed by fifty other persons to do the same for them in their business. We will hear the counsel for the prosecution.

*Kenealy*, for the prosecution.—It is submitted that the prisoner was a clerk or servant within the statute. In *Curr's* case (*Russ. & Ry.* 198), the prisoner was employed by various houses as a traveller to get orders and to receive debts, and had a commission on such orders and debts; he paid his own expenses, and did not live with any of his employers or act in any of their counting-houses. S. and Co. were amongst his employers, and he was indicted for embezzlement of moneys he had collected for them. Upon a case reserved, the judges held that the prisoner was their clerk within the statute. That case is not distinguishable from the present. There the prisoner was employed by several houses at the same time in a similar manner as defendant was in this case.

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COCKBURN, C.J.—In the case of a traveller, he is under the control of his several employers; he is bound to go here and there, and to do this and that according to orders. Here the prisoner was not subject to any such control as seems to be involved in the relation of master and clerk or servant. A traveller may be ordered to go to Manchester or Newcastle, and to do this or that. It could not be contended that a person in a country town who procures persons to insure their lives with an insurance company, and receives a commission for so doing, is the clerk or servant of the company. He is an agent, not a clerk or servant. It must be established that the relation of master and servant exists. Here the prisoner was simply a commission agent. A traveller in one sense may be a clerk.

BRAMWELL, B.—If a person came to the prisoner to give an order, he might refuse to take it.

*Kenealy*.—*Spencer's case* (Russ. & Ry. 299), decides that it is sufficient to establish the relation of master and servant or clerk, if the prisoner is employed on one occasion only to receive money.

KEATING, J.—It is not stated that the prisoner was *employed* to receive money.

COCKBURN, C.J.—Suppose a manufacturer in the country writes to a merchant in London, and says, "Any orders you send will be shipped, and we will allow you a commission." Is the latter a clerk of the manufacturer?

WILLIAMS, J.—On the other hand, if a person is employed to get orders and to receive the money, and is paid a remuneration in respect of both services, I think that would bring the case within the statute according to many of the decisions.

*M'Mahon*, for the prisoner.—In *Bez. v. Goodbody* (8 Car. & P. 665), Parke, B., said he wished that *Carr's case* should be reconsidered. In *Reg. v. Walker* (27 L. J. 207, M. C.; S. C. 8 Cox Crim. Cas. 1), the prisoner kept a refreshment house, and was employed by the prosecutors to get orders for a manure, to collect money and pay it over. He was paid by commission. He was to go about among the farmers to get orders, but no definite time was fixed for so doing. He was called the prosecutors' agent for the district. The prosecutors had a store under the prisoner's control, from which he supplied the manure upon the orders he obtained. In order to obtain the security of a guarantee society for the prisoner's conduct, it was arranged that the prisoner should have a salary of 1*l.* a year. The prisoner having got into arrears, was treated as a debtor for the amount. The prisoner fraudulently appropriated money which he received from customers, and gave a false account. It was held that the evidence showed the relation of principal and agent, not that of master and servant.

By the Court,

*Conviction quashed.*



## COURT OF QUEEN'S BENCH.

November 6, 1860.

REG. v. LEATHAM. (a)

*Corrupt Practices Prevention Act—Bribery—Information—Limitation of proceedings—Evidence.*

*The 17 & 18 Vict. c. 102, s. 14 (the Corrupt Practices Prevention Act) enacts that no person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action, or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this act shall be committed, and unless such person shall be summoned or otherwise served with a writ or process within the same space of time.*

*Quære, whether this section applies to an information for a misdemeanour, and not for a penalty or forfeiture.*

*The defendant was indicted in the first count of an indictment for having paid a sum of money to A., with the intent that it should be expended in bribery at an election, and he was indicted in the other counts with having bribed different voters, when he was found guilty upon all the counts. The evidence was that he paid the money to W., who paid it to A., with the intent as stated in the first count, and that A., and not the defendant, personally bribed the different electors.*

*Held, that this was ground only for an application to the court at the trial that the prosecutor should be compelled to elect upon which of the charges he would proceed, that of having advanced money for the purpose of bribery, or for each distinct act of bribery committed by the agent, he being liable as a principal to be found guilty of the misdemeanour committed by the hands of his agent.*

**I**NFORMATION, 22nd May, 1860:—Be it remembered that Sir Richard Bethell, Knight, Attorney-General of our Sovereign Lady the Queen, who for our said Lady the Queen prosecutes in this behalf, in his proper person comes into the court of our said Lady the Queen, before the Queen herself at Westminster, on the 22nd May in this same term, and for our

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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said Lady the Queen gives the Court here to understand and be informed that heretofore, to wit, on the 29th April, 1859, at the borough of Wakefield, in the county of York, a certain election was duly had and held for the electing of a burgess to serve in this present Parliament for the said borough of Wakefield, and that before and at the time of the committing of the several offences hereinafter mentioned, William Henry Leatham was a candidate to be elected and returned at the said election as a burgess so to serve in Parliament for the said borough of Wakefield. And the said Attorney-General for our said Lady the Queen further gives the Court here to understand and be informed, that heretofore and before the said election was so had and held as aforesaid, to wit, on the 26th April in the year aforesaid, the said William H. Leatham, so then being such candidate as aforesaid, unlawfully, wilfully, and corruptly did advance and pay to one Thomas Field Gilbert certain money, to wit, the sum of 2000*l.*, with the intent that such money or some part thereof should be expended in bribery at the said election, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second count.—And the said Attorney-General for our said Lady the Queen further gives the said Court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully, and corruptly did give and cause to be given to Samuel Croft, he the said Samuel Croft then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, the sum of 30*l.*, in order thereby to induce the said Samuel Croft to vote at the said election for him the said W. H. Leatham, to be thereat elected and returned a burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the said Court here to understand and be informed, that the said W. H. Leatham, in manner and by the means last aforesaid, unlawfully, wilfully and corruptly did bribe the said Samuel Croft, so then being such person entitled to vote at the said election as aforesaid, to give his vote at the said election for him the said W. H. Leatham, to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen her crown and dignity.

Third count.—And the said Attorney-General for our said Lady the Queen further gives the said Court here to understand and be informed, that heretofore and before the said election in the

first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully and corruptly did give and cause to be given to John Burton Rhodes, he the said John Burton Rhodes then being a person entitled to vote at the election for the said borough of Wakefield, certain money, to wit, the sum of 40*l*., in order thereby to induce the said J. B. Rhodes to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the said Court here to understand and be informed, that the said W. H. Leatham, in manner and by the means last aforesaid, unlawfully, wilfully, and corruptly did bribe the said J. B. Rhodes, so then being such person entitled to vote at the said election aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fourth count.—And the said Attorney-General for our said Lady the Queen further gives the said Court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully, and corruptly did give and cause to be given, to wit, by one Robert Sharpley on his behalf, to John Firman Tower, he then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, the sum of 40*l*., in order thereby to induce the said John Firman Tower to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the Court here to understand and be informed, that the said W. H. Leatham, in manner and by means last aforesaid, unlawfully, wilfully and corruptly did bribe the said J. F. Tower, so then being such person entitled to vote at the said election as aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count.—And the said Attorney-General for our said Lady the Queen further gives the said Court here to understand and be

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informed, that heretofore and before the said election in the first count of this information was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully and corruptly did give and cause to be given to George Wainwright, he the said G. Wainwright then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, 20*l.*, in order thereby to induce the said G. Wainwright to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our Lady the Queen gives the Court here to understand and be informed, that the said W. H. Leatham, in manner and by the means last aforesaid, unlawfully, wilfully, and corruptly did bribe the said G. Wainwright, so then being such person entitled to vote at the said election aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, against the peace of our said Lady the Queen, her crown and dignity.

Sixth count.—And the said Attorney-General for our said Lady the Queen further gives the said Court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully, and corruptly did give and cause to be given, to wit, by one Wm. Woodhead on his behalf, to Wm. Cheeseborough, he the said Wm. Cheeseborough then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, the sum of 35*l.*, in order thereby to induce the said Wm. Cheeseborough to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the said Court here to understand and be informed, that the said W. H. Leatham, in manner and by the means last aforesaid, unlawfully, wilfully and corruptly did bribe the said Wm. Cheeseborough, so then being such person entitled to vote at the said election as aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Seventh count.—And the said Attorney-General for our said Lady the Queen further gives the said Court here to understand

and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as aforesaid, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as in the said first count mentioned, unlawfully, wilfully and corruptly did give and cause to be given to Charles Clarkson, he the said Charles Clarkson then being a person entitled to vote at the said election, certain money, to wit, the sum of 30*l.*, in order thereby to induce the said C. Clarkson to give his vote at the said election for him the said W. H. Leatham to be thereat elected and returned a burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the Attorney-General for our said Lady the Queen gives the said Court here to understand and be informed, that the said W. H. Leatham, in manner and by the means aforesaid, unlawfully, wilfully and corruptly did bribe the said C. Clarkson so then being such person entitled to vote at the said election as aforesaid to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

And therefore the said Attorney-General of our said Lady the Queen prays the consideration of the said Court herein the premises, and that due process of law may be awarded against him the said W. H. Leatham in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.

RICHARD BETHELL.

Plea, not guilty. Issue thereon.

The indictment was tried at York Summer Assizes 1860, before Martin, B., and a verdict found for the Crown.

*Sir F. Kelly* (*Edward James, Mellish* and *Quain* with him) moved for a new trial on the ground of misdirection.—First, under the 17 and 18 Vict. c. 102, s. 14, the prosecution should have been commenced within one year of the offence being committed. Here the information was filed on the 22nd of May, 1860, and the latest of the offences charged was committed on the 26th of April, 1859. This information therefore was not filed in time. Secondly, the defendant was not liable to be convicted both upon the first count and the several other counts. The only act the defendant was proved to have done was, that he gave 2000*l.* to Wainwright for the purposes of the election. Wainwright employed Gilbert, who was the agent who bribed the several persons mentioned in the second, third, fourth, fifth and sixth counts of the indictment. There is no instance of a person having been convicted of two offences created by the same section of a statute for one act only done by him. There was no evidence of any specific authority to Wainwright to bribe at all, still less to put money into the hands

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of Gilbert or Sharpley for that purpose. Thirdly, there was no evidence of the defendant having bribed the voters himself, as charged in the second, third, fourth, fifth, sixth and seventh counts of the indictment. Fourthly, the giving of the money to Wainwright was not the giving of it to Gilbert as charged in the first count. Fifthly, inadmissible evidence was received. Certain letters which passed between Wainwright and Leatham were put in evidence compulsorily before the commission to inquire into corrupt practices at the Wakefield election under the 15 & 16 Vict. c. 57, s. 8. These letters are now exempted from being admitted as evidence for any purpose whatever: (sect. 9).

*Cur. adv. vult.*

#### JUDGMENT.

COCKBURN, C.J.—In this case the Attorney-General, on the 22nd of May last, filed an information against the defendant, charging him, in the first count, with having on the 26th of April, 1859, paid to one Thomas Field Gilbert money with intent that it should be applied in bribery at an election for a member of Parliament for Wakefield. There were several other counts, in which the defendant was charged with actual bribery of several persons who were respectively named in those counts. The defendant was found guilty generally. Sir Fitzroy Kelly on behalf of the defendant, on the first day of term, took several objections to the proceedings. The first objection was that the prosecution was out of time, as the offence in each count was laid, and by the evidence was committed, if at all, more than a year before the filing the information and issuing the process upon it. The second ground of objection, as we understood it, was, that as the defendant was found guilty upon the first count, he ought not to have been found guilty upon the other counts, it appearing that there was but one act, namely, that of paying money by him to an agent, so that the actual bribery was by the agent without communication with the defendant as to the individuals whom he was said to have bribed; and that if the present proceedings were good, a man might be prosecuted, convicted and punished more than once for what was, in fact, but one act actually done by him. The third ground of objection was, that the case for the prosecution being that the defendant had employed subordinate agents by whom the bribes were given, the defendant could not be found guilty of having bribed the voters himself. The fourth ground of objection was, that the defendant was stated in the first count to have paid money to one Gilbert, whereas the evidence was that he had paid it to one Wainwright, who had afterwards paid it to Gilbert, but without any direction or interference by the defendant. The fifth ground of objection was, that a document produced compulsorily upon the inquiry of the commissioners under the 15 & 16 Vict. c. 57, was received in evidence against the defendant at the trial. With respect to the first of these objections, if it be one, it appears upon the record, and may

be taken advantage of in arrest of judgment or writ of error, and it is therefore unnecessary for the Court to interfere on motion. But we are strongly disposed to think that the objection is untenable, and that the limitation applies only to proceedings for penalties or forfeitures given by the statute. The words are, "No person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action, or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this act shall be committed, and unless such person shall be summoned or otherwise served with a writ or process within the same space of time." The present is not a proceeding for a penalty or forfeiture, but it is an information for a misdemeanour and is, it seems to us, not within the terms of the 14th section of the 17 & 18 Vict. c. 102. This view becomes strongly confirmed when it is borne in mind that the act we are considering refers specifically to process applicable only to civil proceedings, and not to an indictment for misdemeanour. With respect to the second objection it appears to us that it is now too late to make it, and that, if available at all, it would only be by application at the trial that the prosecutor should be compelled to elect upon which of the charges laid in the information he would proceed. Upon the face of the information each count contains a charge of a separate offence, and, in point of law, there is no objection to any number of misdemeanours, nor even of felonies, being charged in separate counts in one indictment, provided that the judgment be the same for each. There is no doubt that a man by one and the same act may commit two or more several and distinct offences. A man wrongfully intending to kill A. fires a gun at him, but misses him, and kills, without intending it, B. and C. There is but one act, but he would be liable to be indicted three times: for the homicide of B., for that of C., and for shooting at A. with intent to kill him. By the 17 & 18 Vict. c. 102, s. 2, art. 5, paying money to any person with intent that such person should use it to bribe electors, is declared to be equivalent to bribery, and as such a misdemeanour, though no person was actually bribed; and by art. 1 the giving money to an elector to induce him to vote is declared to be bribery, and as such a misdemeanour. But the offences are not the same, though it may be said that they arise from one and the same act. If, however, they were in law the same, a conviction or acquittal upon a charge founded upon the fifth article might, with proper averments, be pleaded to another indictment founded upon the first; and if, as in the present case, both charges were included in one indictment, the court before whom the case was tried, might, in its discretion, put the prosecutor to his election upon the application of the defendant; but as no such application was made in the present case, we do not see upon what ground we can interfere. With respect to the third objection, we are of opinion that if a man employs an agent to corrupt voters, and that agent in carrying such general instructions into effect

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employs subordinate agents, within the scope of the authority received from the principal, such principal with reference to the express terms of this statute, as well as upon general principles of law, will be guilty of a misdemeanour as a principal in the transaction. The fourth ground of objection, appears to be a serious one, and upon that we think there should be a rule. With respect to the fifth objection, we are strongly disposed to think that the proviso to the 8th section of the 15 & 16 Vict. c. 57, only applies to "statements" properly so called, made by any person in answer to questions put to him, and not to documents produced by such persons. As, however, this is a point not free from doubt, and of general importance, we think there should be a rule as to that. We think, therefore that there should be a rule upon the fourth and fifth objections, and none upon the first, second and third.

*Rule accordingly.*



## CENTRAL CRIMINAL COURT.

*February 28, 1861.*

(Before the Lord Chief Baron POLLOCK.)

REG. v. NORTH.(a)

*Larceny—Possession obtained by a trick—Credit.*

*The prisoner, a broker, having large dealings with the prosecutors, Russian merchants, in October entered into a contract for the purchase of 343 casks of tallow which were expected to arrive by the "Hesper" in the ordinary course of trade. The tallow arrived accordingly on the 5th of December, and in due course the transaction should have been completed within fourteen days, and notice was given to prisoner of the arrival of the tallow, and he was called upon to complete the bargain. He requested that the tallow might be allowed to remain in the docks for a short time. This was granted. On January 28th, the manager for the prosecutors called on him and insisted on the completion of the contract, and the prisoner said he would pay for the tallow on the following day. On the next day the prisoner sent his clerk to the prosecutors' counting-house and obtained delivery orders for the tallow, and tendered to prosecutors a crossed cheque on the Bank of London for 8,781l. 8s. 9d., which was the price of the tallow. Immediately on obtaining possession of the delivery orders, prisoner sent them to the docks and transferred the property into fresh warrants, and when the cheque was presented there were no assets:*

*Held, not to be a larceny of the delivery orders by a trick; but a lawful possession of them obtained by reason of the prosecutors giving to the prisoner credit in respect of the crossed cheque.*

**P**RISONER was indicted for larceny of two pieces of paper, and two orders for the delivery of 3,027 cwt. of tallow, the property of John Gillibrand Hubbard.

A second count charged that the prisoner was bailee of the tallow, and fraudulently converted it to his own use.

*Giffard and Matthews, for the prosecution.*

*Parry, Serjt., and Metcalfe, for the prisoner.*

The facts may be briefly stated thus:—

The prisoner was a member of the firm of Nickoll and North,

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who carried on business as Russian brokers in Bishopsgate-street, and they had extensive transactions with the prosecutors, who are Russian merchants, and it appeared that in October last the prisoner entered into a contract for the purchase of 343 casks of tallow that were to arrive in this country by a vessel called the *Hesper*, in the ordinary course of the trade. The tallow arrived on the 5th of December, and in due course the transaction should have been completed within fourteen days, and notice was given to the prisoner of the arrival of the tallow, and he was called upon to complete the bargain. He, however, requested that the tallow might be allowed to remain in the docks for a short time, and he asked for some delay. This was granted, but on the 28th of January the prosecutors' manager, a gentleman named Miller, insisted upon the transaction being completed, and the prisoner then said he would pay for the tallow on the following day. Accordingly, on the 29th of January, the prisoner sent his clerk to the prosecutors' counting-house, and obtained delivery orders for the tallow, and he then handed to the prosecutor a cheque, crossed, upon the Bank of London, in Threadneedle-street, for 8781l. 8s. 9d., which was the price of the tallow. It appeared that immediately upon the prisoner obtaining possession of the delivery orders he sent them to the docks and transferred the property into fresh warrants, and when the cheque was presented at the bankers it was found that he had only 9l. 3s. 4d. standing to his credit.

POLLOCK, C.B., at the close of the statement, expressed his opinion that, under the circumstances, a charge of larceny could not be supported.

*Matthews* said, the way he should put it was this—The prosecutors only intended to part with the possession of their property upon receiving cash, and the prisoner, by a trick and device—that was to say, by giving a crossed cheque when he knew that there was no money at the bankers to meet it—got possession of the property, and this would amount to larceny.

POLLOCK, C.B.—It appeared to him that the prosecutors had given the prisoner credit. By receiving the crossed cheque, in point of fact, they gave the prisoner a day's credit.

*Matthews*.—He should submit that it was a question for the jury, whether the whole proceeding was not a trick on the part of the prisoner to defraud the prosecutors of their property. He must have known at the time he gave the cheque that there was no money at the bankers to meet it. There was also another point. He should be able to show that, according to the custom of the trade, if the cheque was not paid, the delivery order should have been returned, and there was a distinct understanding that the prosecutors would not part with their property except upon the condition that they were to receive the cash. He also called his Lordship's attention to the second count, which charged the prisoner with having fraudulently misappropriated property of which he was only the bailee.

**POLLOCK, C.B.**—It would be impossible to support that count upon the facts of the present case. The statute required that the party must be an actual bailee of the property he was charged with misappropriating, and that it would not do to endeavour to place him in that position by the terms of a particular contract.

**Matthews.**—The question is one of very considerable importance to the mercantile community. The prisoner had obtained possession of a large quantity of property by giving a cheque which he knew would not be paid, and, having done so, he absconded.

**POLLOCK, C.B.**, said that he fully appreciated the importance of the question that was under consideration; but it had always appeared to him to be of the utmost importance that the transactions of commerce should not be liable to be made the subject of larceny, and that they should not be controlled by such a liability. He had always done all in his power to discourage such proceedings, because he believed that the result must necessarily be to shake all confidence in the commercial dealings of the country; and, in his opinion, matters that were properly the subject of inquiry in a civil court ought never to be transferred to a criminal one. Although he had no doubt that in this case the facts would not justify the conviction of the prisoner for the offence of larceny, he would consult Mr. Baron Channell upon the subject.

Upon his return he said that Mr. Baron Channell concurred with him entirely in the view he had taken of this case. The vendors, no doubt, had the right to insist upon receiving cash for the goods, and they were not bound to take a crossed cheque, but they chose to do so, and that act was tantamount to giving the prisoner two days' credit. It appeared to him that it was just the same as though they had taken a bill at two days' sight, and that it was impossible to turn such a transaction into a larceny, and Baron Channell agreed with him that there was no case to be submitted to the jury.

**Giffard** said that his Lordship was in possession of all the facts, and after the strong opinion he had expressed with regard to the case, he should not make any further observations respecting it.

**POLLOCK, C.B.**—The prosecutors had evidently agreed to postpone the payment for the goods, and the prisoner had the entire control over the property, and, although he might have acted as a fraudulent debtor, he was clearly of opinion that upon the evidence in this case he could not be made amenable to a charge of felony. The answer to the present charge appeared to him to be that the prosecutors had given the prisoner credit when they were not bound to do it, and that they had nobody to blame but themselves.

The jury then returned a verdict of *Not Guilty*, adding, at the same time, that it was to be understood that they gave this verdict by his Lordship's direction.

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## CENTRAL CRIMINAL COURT.

*April 11th, 1861.*

(Before T. CHAMBERS, Esq., Q.C., Common Serjeant.)

REG. v. GIBSON.(a)

*Embezzlement—Prisoner, who was a solicitor, was land agent and manager of assessments and rating of Eastern Counties Railway—Within the 7 & 8 Geo. 4, c. 29, a clerk or servant.*

*Indictment charged the prisoner, who was a solicitor, with embezzlement. It appeared from his appointment, as entered in the minute book of the company, that he was a land agent to the company, and that in the course of his duties he collected the rents of houses, refreshment stalls, book stalls, &c., and should have paid the sums over to the company, and that he managed the parochial assessments, &c., as to the justness of claim, &c. His salary was 300*l.* a year, and an extra sum was allowed for travelling expenses :*

*Held, that he was a clerk or servant within the meaning of the Act 7 & 8 Geo. 4, c. 29.*

**P**RISONER was indicted for that, being clerk to the Eastern Counties Railway Company, he did feloniously embezzle certain moneys received for and on the account, &c.

*Ballantine, Serjt. (Tindal Atkinson with him), for the prosecution.*

*Parry, Serjt. (Metcalf with him), for the prisoner.*

The evidence of John Blackman Owen, Secretary to the Eastern Counties Railway:—The prisoner was appointed in 1853.

*Parry, Serjt.*—That will appear by the minute book. Produce it.

Witness (producing book and reading): “30th June, 1853. Resolved, that Mr. John Robinson Gibson be appointed the company’s land agent, at a salary after the rate of 200*l.* from the 16th instant, and that he find security for 300*l.* The increased parochial assessments being brought before the attention of the board, it is desirable to take steps to secure the services of a

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

person whose knowledge and experience could be brought to bear upon the excessive demands brought against the company by the parish authorities." His duties were to collect and account for the rents of the company's house and surplus properties; also to examine all claims which might be made on the company for rates and taxes of every description, and to certify as to the correctness of those claims before submitting them to the directors for payment. When he collected the rents it was his duty to account for such moneys as he received. This (book produced) is his cash book which he used to keep with regard to the surplus property. It was no part of his duty to pay money for assessments; when he received money it was his duty to pay it over to the cashiers.

Cross-examined by *Parry*, Serjt.—I never heard a single instance of the prisoner having paid claims made on the company for rates and taxes out of the moneys received by him on account of rents. Prisoner was engaged on account of his legal knowledge upon parochial matters.

*Parry*, Serjt., objected that prisoner was not a clerk or servant. The prisoner is not a servant in a sense to bring him within the Act 7 & 8 Geo. 4, c. 29. To come within that Act he must be either a clerk or servant, and it has been shown that he was an officer appointed as land agent and assessment attorney to the company. Attorneys were appointed to conduct the parliamentary business of a company or the parochial assessments, but they did not thereby become clerks or servants to the company. There was no evidence of a hiring, no stipulation as to notice being given on either side should it be desired to terminate the connection, it might have been put an end to at a moment's notice. The prisoner was really one of the attorneys to the company.

*Metcalfe* was heard on the same side.

The COMMON SERJEANT.—I do not see that there is any evidence of his having discharged the duties of an attorney. He was appointed land agent and manager of parochial assessments on account of his special qualifications, but he acted as clerk or receiver of rents at an annual salary.

Objection overruled.

*Guilty.*

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v.  
GIBSON.  
1861.

*Embezzlement*  
—Clerk or  
servant.

## CENTRAL CRIMINAL COURT.

*May 6th, 1861.*

(Before the RECORDER OF LONDON.)

REG. v. J. WHYBROW.(a)

*Perjury—Information laid and summons issued—Production of original summons required upon indictment for perjury.**Prisoner was indicted for wilful and corrupt perjury committed at the Westminster police court. A summons was granted upon an information, and upon the hearing of the summons the perjury assigned was committed. At the trial the information was produced, but not the summons :**Held, not sufficient. The summons should have been produced.***L**AXTON, for the prosecution.

Somers Higgins, clerk at the Westminster police court.—On 13th February a charge was preferred against a person of the name of Purdue, it was upon an information. I have the information here (information produced). It is upon this information a summons was issued; the information alleges that Purdue had committed wilful and corrupt perjury. The matter came on for hearing on the 13th February, the defendant Whybrow then gave evidence on behalf of Purdue.

*Sleigh.*—The summons was issued upon the information?

Witness: Yes.

*Sleigh.*—And upon the summons the defendant Purdue appeared?

Witness: Yes. I have not got the summons here.

*Sleigh* then submitted that the summons must be produced, that being the evidence of the nature of the charge which Purdue was called upon to answer.*Laxton.*—The information is sufficient, that being the original basis of the investigation.

The RECORDER.—Did he not appear upon the information?

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

The summons was issued for the purpose of compelling his attending upon the information.

Witness: This is the usual information that magistrates require before a summons is issued. The defendant Whybrow was duly sworn. Purdue was told what he was charged with. I read out the summons to him, the charge was communicated to him by reading the summons. The information is never read to the defendant.

The RECORDER.—After this evidence, I think the summons must be produced. It appears the charge Purdue was called upon to answer was contained in the summons; he may have never seen or heard of the information, the information does not seem to be brought to his knowledge in any way. We must know what the charge was in order to see whether the evidence given by the defendant Whybrow was material or not. The summons not being here we have no evidence of the charge. The defendant must be acquitted.

*Not Guilty.*

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v.  
WHYBROW.  
—  
1861.  
—  
Perjury—  
Evidence.

## WESTERN CIRCUIT.

*Bodmin, March 18, 1861.*

(Before Baron MARTIN.)

REG. v. ARNALL. (a)

### *Evidence.*

*A conversation between two persons in relation to the charge under investigation made in the presence of the prosecutrix, but in the absence of the prisoner, admitted.*

### INDICTMENT for rape.

*H. T. Cole, for the prosecution.*

*Coleridge, Q.C., and Roupe, for the prisoner.*

*Coleridge proposed to ask a witness for the defence as to something that had been said by a relative of the prosecutrix to a*

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

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ARNALL.  
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Evidence.

relative of the prisoner, in the presence of the prosecutrix, about making it up.

*Cole* objected that evidence of a conversation between third persons, not made in the presence of the prisoner, was inadmissible.

MARTIN, B.—In a civil case, what is said in the presence of either of the parties is admissible, because it is open to the party so present to express assent or objection to what is said, and that would be admissible against him. In criminal cases the prosecutor, although not in strict law a party to the case, is so in fact, and I think that the rule applicable to conversation in the presence of a party in a civil case might be fairly extended to a conversation in the presence of the prosecutor in a criminal case.

*Evidence admitted.*

## WESTERN CIRCUIT.

### CORNWALL SPRING ASSIZES.

*Bodmin, March 16, 1861.*

(Before Baron MARTIN.)

REG. v. DENMOUR AND WIFE.(a)

*Bailee—Husband and wife.*

*Where husband and wife were jointly indicted for larceny under the bailee clause, and it was proved that they took charge of the property, but the wife alone disposed of it afterwards :*

*Held, that neither could be convicted: the wife, because she could not be a bailee; the husband, because he was not proved to have taken part in the conversion.*

**P**RISONERS were indicted for having as the bailees of Grace Webster unlawfully converted to their own use certain articles of clothing, the property of Grace Webster.

*E. W. Cox*, for the prosecution.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.



It was proved by the prosecutor that the prisoners were husband and wife; that having come to Falmouth to get a place, she had gone to the prisoners' house, and they together offered to take charge of her clothes. Knowing them she accepted their offer. Two days afterwards, having procured a place, she went to the prisoners and demanded her clothes; they said that they had parted with them, but that she should have them again in a few hours. The clothes were not returned, for in fact some of them had been sold, and some pawned, by the female prisoner alone. On this evidence,

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DENMOOR  
AND  
WIFE.  
—  
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*Bailees—Husband and wife.*

MARTIN, B., asked counsel if he thought he could support the charge. The indictment was for larceny as bailees. The prisoners were husband and wife. A wife could not be a bailee, and the husband was not proved to have taken any part in the alleged conversion.

*E. W. Cox* said that he fully assented to his Lordship's view of the case.

*An Acquittal was directed.*

## OXFORD CIRCUIT.

SPRING ASSIZES, 1861.

(Before Mr. Justice BLACKBURN.)

REG. v. GREEN.

*Accessory—Preventing Apprehension—Evidence.*

*Defendant, an inn-keeper, having an escaped felon in his house, to the policeman, who had remarked "You scoundrel, how dare you harbour a felon?" said "You had better go and find him;" but he did nothing, and the policeman went up stairs and saw the felon make his escape from the window:*

*Held, to be no evidence of an obstructing of the felon's apprehension.*

*The indictment charged the defendant as accessory to an escape of a felon from prison by harbouring him after his escape:*

*Quære, is such a count bad as charging the defendant to be an accessory to a misdemeanor, prison breach being a misdemeanor only?*

**D**EFENDANT was indicted for harbouring one James Pearce, who had been committed to Abingdon Gaol on a charge of

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v.  
GREEN.

1861.

Accessory—  
Obstructing  
apprehension of  
a felon.

felony, but had escaped by breaking out of prison on the 4th day of February, 1861, at Abingdon. The second count charged that Pearce had broken from prison and that the defendant had refused to deliver him up to the officers who were in pursuit, and had hindered and obstructed his apprehension.

*Sawyer*, for the prosecution.

*Griffiths*, for the defendant.

It appeared that, on the 4th of February last, the prisoner was in Abingdon Gaol for several charges of felony, to which he this day pleaded "Guilty." He was on that day left in the pump-room, and made his escape by breaking one of the iron bars with a stone taken from the floor. Search was made, but he could not be found. The next day the governor of the gaol obtained a search warrant, and, accompanied by two policemen, went to the Fox beer-shop, kept by the defendant, and said to him, "You scoundrel, how dare you harbour a felon?" The defendant then said, "You had better go and find him," and the governor ran up stairs and was just in time to see the felon get out of the window and make his escape. He was afterwards re-taken.

*Griffiths* contended that since the statute 1 Edward II., st. 2, c. 1, the offence of breaking out of prison was only a misdemeanor (1 Russell on Crimes, b. 2, c. 33). The first count was, therefore, bad, because it charged the defendant as an accessory to a misdemeanor. He also contended that there was no evidence that the defendant had obstructed Pearce's apprehension, as alleged in the second count.

BLACKBURN, J., thought there was no evidence to support the second count; but he would, if necessary, reserve the question as to the first count, and leave it to the Jury to say whether the defendant, knowing that Pearce had broken from prison, had endeavoured to conceal him from the police.

*Not Guilty.*

## HOME CIRCUIT.

SPRING ASSIZES, 1861.

(Before Mr. Justice WIGHTMAN.)

REG. v. HAZELL.

*Evidence—Depositions.*

*A deposition taken before the Coroner on the inquest is admissible in evidence where the witness is so ill as to be unable to attend at the trial, in the same manner as a deposition taken before the magistrate.*

**P**RISONER was charged with the wilful murder of a child.  
*Robinson*, for the prosecution.

*Robinson* applied for the permission of the Court that the depositions of two witnesses who had been summoned before the Coroner, but who were now, through illness, unable to attend and give their evidence, might be placed before the grand jury. He said that it appeared to him that the evidence of these two witnesses was very material in support of the prosecution, and that it was essential the evidence they had to give should be laid before the grand jury.

WIGHTMAN, J., having referred to the Act authorizing the use of depositions where the witnesses themselves were too ill to attend, said he was of opinion that it gave him the power to treat depositions that were taken by a Coroner in the same way as those taken by a Magistrate, but in so serious a case he doubted whether the power ought to be exercised.

*Laxton*, for the defence, said he should certainly oppose the application, as the prisoner was most anxious that the witnesses referred to should be cross-examined upon several matters which he considered most essential to his defence, and he would rather have the trial postponed, so that the witnesses might have an opportunity of attending.

*Robinson* said he had no objection to the trial being postponed.

*Trial postponed.*

## NORTHERN CIRCUIT.

LANCASTER SUMNER ASSIZES.

*Lancaster, August 9, 1859.*

(Before Baron WATSON.)

REG. v. BRAITHWAITE.

*Perjury—Evidence—Contradiction.*

*Although it is not now necessary that the alleged perjury should be proved by two witnesses in contradiction of the prisoner, it is still requisite that the perjury should be proved by something more than the mere contradictory oath of the prosecutor. He must be corroborated by some independent testimony.*

*Where, therefore, the alleged perjury was that the prisoner had sworn that he had paid certain sums of money on certain days, and that he had never said that certain packages contained a certain sum of money, and he was convicted only by the denial of the prosecutor, It was held (after consultation with Hill, J.), that there was not evidence to go to the jury.*

GEORGE BRAITHWAITE was indicted for wilful and corrupt perjury before Mr. J. J. Lonsdale, the County Court Judge of North Lancashire, on the 26th day of July last.

*Campbell Foster*, for the prosecution.

*Kay*, for the prisoner.

It appeared from the opening statement that the prisoner is a corn miller at Heathorne, near Clitheroe, and the prosecutor, Joseph Bland, was a workman in his employment, earning wages of 1*l.* a week. For nearly a year the prosecutor did not draw his wages, and on the 13th of December last, on coming to a settlement 50*l.* were found to be owing to him on account of wages, for which the prisoner gave him a memorandum or acknowledgment of that amount being due to him. He went on working for the prisoner till April, who paid him his wages subsequent to the 13th of December, and then the prosecutor left his service. Having many times applied in vain for payment of

the 50*l.* due to him, and having only received 2*l.* on account, the prosecutor at last took out a summons in the County Court at Clitheroe to recover the balance of 48*l.* due to him. The plaint was fixed for hearing on the 26th of July. The day before the prisoner called on the prosecutor and asked him to walk home with him, and on arriving at the prisoner's house the prisoner said he would pay him, and asked him to sign a receipt on the particulars of demand delivered with the summons from the County Court. The prisoner then gave the prosecutor two packages of silver, which he said contained 13*l.* each, a loose package which he said contained 6*l.* in silver, and 16 sovereigns, making altogether, as the prisoner alleged, 48*l.* The prosecutor took it without counting it, and carried it to a Mrs. Watson's, where he was stopping, and counted it over. He then found that the loose package of silver contained only 5*l.*, and that the other packages contained only 10*l.* each, and that he had been paid 7*l.* short. He went back and complained to the prisoner, who refused to hear him or alter the payment. Next day the prosecutor met the prisoner in the streets of Clitheroe, and told him he should go on with the plaint and would have his 7*l.* The prisoner persisted that he had paid him the full amount as stated. On going before the County Court Judge the prisoner swore that he had paid the whole amount alleged to be due—namely, 42*l.*—the day before, and two sums of 4*l.* and 2*l.* previously; and that he had never said the two packages of silver contained 13*l.* each, or that the loose package contained 6*l.* The prosecutor denied the payment of the two sums on account, and the prisoner had no vouchers or entries of these payments. The County Court Judge disbelieved the prisoner, and gave judgment for the plaintiff.

The only corroboration of the testimony of the prisoner was the evidence of Mrs. Watson, who counted the money; as to all the rest of the evidence, it was simply the oath of the prosecutor against the oath of the prisoner.

Kay submitted that this was not enough, and that the evidence of the woman Watson was really founded on the evidence of the prosecutor, and not independent corroborative testimony.

WATSON, B., said he would consult Mr. Justice Hill, and on his return said, that both Mr. Justice Hill and himself were of opinion that this evidence was not sufficient to go to a jury to convict the prisoner of perjury. The old law required two witnesses to contradict a prisoner charged with perjury on a material fact; but that rule was now exploded, and it was held that it must be the oath of a witness and something more—some independent and corroborative testimony. Here there was no other evidence independent of the prosecutor's, and he must therefore direct an acquittal.

*Not Guilty.*

R & G.  
v  
BRAITHWAITE.  
—  
859.  
—  
*Perjury—  
Evidence.*

## NORFOLK CIRCUIT.

## BEDFORDSHIRE SPRING ASSIZES.

*Bedford, March 11, 1861.*

(Before the Lord Chief Baron POLLOCK.)

REG. v. FRAZER and NORMAN.(a)

*Abduction—Taking away an unmarried girl out of her father's possession—9 Geo. 4, c. 31, s. 20—"Unlawfully take."**The words of the statute being "unlawfully take," it is not necessary to show a trespass or anything of that nature in the taking, other than the act of taking.*

**J.** FRAZER and W. Norman were indicted under the 9 Geo. 4, c. 31, s. 20, which enacts "That if any person shall *unlawfully take*, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor," &c.

*Orridge*, for the prosecution.*Naylor and Douglas Brown*, for the prisoners.

It appeared from the evidence for the prosecution that the prisoners persuaded the girl, A. B. and another above the age of sixteen, to meet them at the railway station and accompany them to London. They stayed in London a few days and returned to Bedford, A. B. going back to her father's house. It also appeared that she accompanied the men very readily, and that, although not sixteen years of age, she had been in the habit of staying out late at night, and that her conduct was generally bad. It also did not appear that the father had hitherto taken such care of her as might be expected, if he had desired to take a proper parental interest in her.

At the close of the case for the prosecution, *Naylor* submitted that although a taking had been proved, and against the will of

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law,

the father, that was not sufficient. The words of the statute being *unlawfully take*, the legislature must have intended some act in the taking that was unlawful before the passing of the statute. Something in the nature of a trespass must have been intended, or the words of the statute would have been, shall *take* or cause to be taken, &c. The taking to satisfy the indictment must be by some active means, as by opening a window and assisting in an escape from the premises of the father, or with personal violence. He also contended that a mere temporary absence with the prisoners was not sufficient, and in this case there was nothing more, the girl leaving on a Saturday and returning home on the Wednesday following.

*Orridge* referred the Court, as to the first point, to *Manhletow's* case (6 Cox Crim. Cas. 143), and as to the temporary taking to *Reg. v. Timmins* (8 Cox Crim. Cas. 401).

The LORD CHIEF BARON said, upon the first point, he would consult Mr. Justice Williams (who was presiding in the other court), the latter objection was answered by *Reg. v. Timmins*. Upon his return his Lordship said he was of opinion it was not necessary to prove such a taking as *Mr. Naylor* suggested, and the taking here proved was sufficient to satisfy the statute, if the jury were satisfied upon the facts. But that he had considerable doubt as to whether the statute was intended to apply to a case where so much profligacy on both sides was shown. A father is bound to take reasonable care of his child, and this man's conduct in regard to the management of his daughter causes a doubt as to whether she really was taken away against the will of the father.

*Not Guilty.*

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FRAZER AND  
NORMAN.  
1861.  
Abduction.

## NORFOLK CIRCUIT.

CAMBRIDGE SPRING ASSIZES.

*Cambridge, March 16, 1861.*

(Before Mr. Justice WILLIAMS.)

REG. v. RICHARDSON.(a)

*Embezzlement—Evidence given of acts of embezzlement other than those charged in the indictment.*

*An indictment charged the prisoner with having embezzled three sums of 2l., the moneys of his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended the sums charged in the indictment were subjects of a mistake in the keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion : Held, that such evidence was admissible.*

**WILLIAM RICHARDSON** was indicted for that he on the 23rd day of March 2l., on the 13th day of April 2l., and on the 27th day of April 2l., feloniously did embezzle the said sums, being the moneys of his employers, Harrison and others, he being at the time their clerk.

The larceny of the sums was also charged.

*O'Malley, Q.C., and J. Hillam Mills, for the prosecution.*

*Power, Q.C., and Naylor, for the prisoner.*

The prisoner was clerk in the employment of the prosecutors, and kept a book in which it was his duty to enter amounts paid out, chiefly for wages; in this book were the items, the total being cast up, the amount was transferred to another book, called the cash book. On the 23rd of March, certain payments were entered in the first book, really amounting to 20l. 12s. 8d., but which in casting up the prisoner made 22l. 12s. 8d., which latter

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law,



sum was carried to the cash book. On the 13th of April the amount paid was 19*l.* 13*s.* 5*d.*, but in casting up the prisoner made this 21*l.* 13*s.* 5*d.*, and this latter sum was carried to the cash book. On the 27th of April, 17*l.* 14*s.* 3*d.* was paid, but cast up as 19*l.* 14*s.* 3*d.*, and so carried to the cash book. The sums as cast in the cash book he received for the current week.

*O'Malley* opened these facts, and proceeded to say, although by law only three sums could be charged in one indictment, which sums must have been embezzled or stolen within six months, yet as it might be assumed for the purposes of the defence that these sums were the result of mistakes in the book-keeping, he would go into other transactions of a similar character, in order to guide the jury to a proper conclusion.

*Power*, Q.C.—I shall certainly object to your doing anything of the kind.

*WILLIAMS*, J.—But I am of opinion that he can.

*O'Malley* continuing, observed that he proposed to show the jury that from the 12th day of December, 1858, to July, 1860, this system of speculation had been carried out by the prisoner, one, two, or three pounds being abstracted on each occasion. Eighty pounds in all had been so abstracted by means of these false entries, and with these facts proved it would be for the jury to say if they could believe in the prisoner being a victim to a series of mistakes.

*O'Malley*, Q.C., then proved the stealing the three sums mentioned in the indictment, and was about to give evidence of the others opened by him.

*Power*, Q.C., objected. There is no reason why each sum now sought to be proved should not have been subjects of other indictments. The prisoner is attempting to answer a charge of stealing or embezzling three sums of money. If this evidence be admitted, he has to prove to the jury he has not stolen or embezzled fifty sums, or the jury are asked to infer such is the case. What is the object in limiting the indictment to three sums if evidence is to be given of fifty.

*WILLIAMS*, J.—I am of opinion the evidence is admissible. When several felonies are part of the same transaction evidence of the whole is admissible, though all the felonies are not included in the indictment before the court. In *Rex v. Clewes*, 4 Carrington and Payne, 223, proof of one murder was admitted to show a motive for committing another.<sup>(a)</sup> The case of *Reg. v. Geering*, 18 L. J. M. C. 215, is a well known case of murder, tried before the Lord Chief Baron. The prisoner was charged with having poisoned her husband with arsenic. With a view to show that the administering was not accidental evidence was offered to show

(a) *LITLEDALE*, J.—I think I must receive the evidence on the part of the prosecution. It is put thus : that the prisoner and others employed Hemmings to murder Mr. Parker, and he being detected the prisoner and others then murdered Hemmings to prevent a discovery of their own guilt. Now to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker.

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—  
1861.  
—  
*Embezzlement*  
— *Evidence.*

that she had administered arsenic to three of her children, and they had died, exhibiting symptoms similar to those attending the death of her husband. Upon an objection being taken, the Lord Chief Baron overruled the objection, received the evidence, and subsequently refused to reserve the point for the consideration of the judges. I shall ask the jury whether they are of opinion that the wrong castings in the wages book, and the false entries in the cash book, are the results of error or design.

Evidence admitted.

*Guilty.*

NOTE.—In the case quoted above, *Reg. v. Geering, Hurst*, for the prisoner, objected to the reception of evidence that three other members of the family residing with the prisoner had died, and that the symptoms attending the deaths of all the four parties were the same, on the ground that the facts proposed to be proved took place subsequently to the death of the husband, and that the effect of them was to show that the three cases of poisoning were felonious.

*Horn and Creasy*, for the prosecution, contended that the evidence was admissible for the purpose of proving, not that the prisoner had feloniously poisoned the deceased; but that the deceased had in fact died of poison, administered by some party; and secondly, that the evidence was admissible for the purpose of proving that the death of the deceased husband was not accidental: (*Reg. v. Bailey*, 2 Cox Crim. Cas. 311.)

POLLOCK, C.B.—I am of opinion that evidence is receivable, that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case, I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence, to show that during the time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony.

His Lordship took time to consider whether he ought to reserve the point for the consideration of the judges, and afterwards intimated to the prisoner's counsel that Alderson, B., and Talfourd, J., concurred with him in opinion that the point ought not to be reserved: (18 L. J. M. C. 215.)

## NORFOLK CIRCUIT.

## SUFFOLK SPRING ASSIZES.

*Bury St. Edmunds, March 21, 1861.*

(Before the Lord Chief Baron POLLOCK.)

REG. v. GARNHAM. (a)

*Night poaching—Tame pheasants—Entering for the purpose of taking game—Pheasants under a hen subjects of larceny—Not game, subject to the Act 9 Geo. 4, c. 69, s. 9.*

*Prisoner was indicted for night poaching, unlawfully entering land by night to the number of three or more, for the purpose of taking, &c. The keepers were watching tame pheasants shut up in coops, when the prisoner with others entered. He was arrested and indicted under 9 Geo. 4, c. 69, s. 9:*

*Held, that pheasants under the control or care of a hen were not game, but might be subjects of larceny; also that a second count, for assaulting, &c., whilst in pursuit of game, could not be sustained.*

GEORGE GARNHAM was indicted for that he on the 3rd day of August, A.D. 1860, in company with others to the amount of three or more, being armed with offensive weapons together by night unlawfully on land in the occupation of the Rev. Charles Vernon, &c., for the purpose, &c.

*Mayd, for the prosecution.*

*Markby, for the prisoner.*

The evidence for the prosecution showed that on the night of the 3rd of August the prosecutor's keepers were watching some tame pheasants in Wherstead Park. The birds were in coops, about 150 yards from the house. They were not shut up, that is, confined in the coops, but could run in and out, and on this night were roosting in trees close by. Common hens were also in the coops, having been used for rearing the young pheasants. At about half-past one in the morning, the prisoner and three others came up to the coops, and looking in, one said, "There is nothing here but an old hen." They were looking in at the other coops

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law,

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Game—Night  
poaching.

when the keepers rushed upon them. A struggle ensued, and the prisoner was apprehended.

*Markby*, for the prisoner.—On this evidence I contend the prisoner cannot be convicted. The offence proved, if any, is an attempt to commit a larceny, and not night poaching. These were tame pheasants, and so ceased to be subject to the game laws. In *Reg. v. Head*, 1 Foster and Finlaison, 351, Lord Campbell held that pheasants that have been reared under hens and have never become wild may be the subject of larceny.

*Mayd.*—The pheasants could run about the park, and on this night were roosting in trees. They could go where they liked, and the keeper could not restrain them at any moment. Under such circumstances these birds were not tame.

POLLOCK, C.B.—I take it if a man go into a London market and buy pheasants' eggs and hatch them under a common hen, when the birds became free from control they would come under the game laws. The question here is whether these pheasants were not under the control of the hens and the watchers.

*Mayd.*—If these birds crossed the road they would cease to be the property of Dr. Vernon. Or if a person without a certificate shot one he would be liable to be surcharged.

His LORDSHIP having consulted Mr. Justice Williams, said he was of opinion that these birds could not be considered game within the meaning of the statute. As long as they were under the charge of the hen, as long as she was their guardian, and while they were about her and running about with her, he who took them was guilty of larceny. There was no proof of entering for the purpose of taking game, so upon that count of the indictment the prisoner must be acquitted.

*Markby.*—The second count charges the prisoner with committing an assault in resisting his lawful apprehension, while entering, &c., and being in pursuit of game. This must also fail.

*Mayd.*—I would ask to amend, so that it should be resisting his apprehension while in the act of committing an indictable offence.

His LORDSHIP refused to allow an amendment.

There being a third count for a common assault, on that the jury found the prisoner

*Guilty.*

## CENTRAL CRIMINAL COURT.

January 7, 1861.

(Before the RECORDER OF LONDON.)

REG. v. WILSON AND ANOTHER. (a)

*Practice—Depositions—Evidence.*

*A witness who had been examined before the magistrate, and whose deposition was returned, was, at the trial, said to be too ill to give evidence, though not too ill to be able to travel.*

*Deposition read, the Court being of opinion that the words of the statute, "so ill as not to be able to travel," were applicable to a case where the witness is so ill as not to be able to travel for the purpose of giving evidence.*

THE prisoners were indicted for feloniously uttering a forged note for 10*l.*, with intent to defraud. The surgeon's evidence is necessarily given in full.

Mr. Ebenezer Pyc Smith, surgeon, deposed that the witness, Mr. Arthur Bennett, was under his care, and suffering from a tendency to softening of the brain. That he had been ill about two months, and by his advice was now in the country. That he had seen him as late as Friday last, and that he was not then in a condition to come and give evidence, the effort of giving evidence would be dangerous to his life, and he as his medical attendant had forbidden his coming.

Being cross-examined by *Metcalf* (*Sleigh* with him) for the prisoners, Mr. Smith said: Mr. Bennett (witness) is at St. Albans, he walks out, and I dare say can do so every day; he could go to the train and by the train, and it would not much hurt him to go by a cab; but I say he is unable to travel and give evidence at this court. I think he is so ill and nervous that if vigorously cross-examined he would soon become confused, and could not be depended upon. He is forgetful. I saw him last on Friday, and thought him worse than he was a month or three weeks ago. I saw him just before last session for the purpose of judging whether he could come and give evidence; he is worse now than he was then.

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

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WILSON.  
—  
1861.  
—  
*Evidence—  
Depositions.*

*H. Matthews* (with *Giffard*), for the prosecution.—Q. Would travelling, with the knowledge that he was coming to give evidence, be injurious to him?—A. I think it would.

To the COURT.—He is not too ill to travel; he can journey, but he cannot complete the object of that journey. He could certainly travel from St. Albans here without material injury to his health.

*Giffard*.—I now propose the witness's deposition should be read.

*Metcalfe* and *Sleigh* objected.

*Giffard*.—It is admissible both at common law and by the statute. In an old case, when a witness on his journey to the place of trial was taken so ill as to be unable to proceed his deposition was allowed to be read: (*Luttrell v. Reynell*, 1 Mod. 284.)

The RECORDER.—In that case he was unable to travel.

*Giffard*.—Inability to travel is a test of illness, not a condition precedent. In *Reg. v. Cockburn* (7 Cox Crim. Cas. 265), the prisoner was able to travel, but could not have given evidence, not being able to speak or hear. The deposition was read, and the Court of Criminal Appeal said rightly.

The RECORDER.—But here he could be brought without danger to health even.

*Giffard*.—Yes; but although in point of health he might be brought, he could not give evidence without danger to life.

*Matthews* (with *Giffard*).—A helpless trunk may be moved or able to travel for the benefit of his health, yet not able to travel to give evidence. The statute is not intended to restra in the action of the common law. The common law requires *permane* n illness, the statute recognises *temporary* illness. By the commo law, in the case of a woman about to be confined, the trial must be postponed; but under the statute the deposition may be read. So in cases of insanity, temporary insanity, under the statute the deposition may be read.

The RECORDER.—Since the passing of the statute the common law has been acted upon. I shall allow the deposition to be read.

Deposition read.

*Guilty.*

NOTE.—In cases upon this point see *Reg. v. Harris* (4 Cox Crim. Cas. 440), *Reg. v. Harney* (*id.* 442), *Reg. v. Day* (6 Cox Crim. Cas. 55), and *Reg. v. Cockburn* (7 Cox Crim. Cas. 265).

## COURT OF CRIMINAL APPEAL.

*Saturday, April 27, 1861.*

(Before POLLOCK, C.B., WILLIAMS, WILLES, and BLACKBURN,  
JJ., and WILDE, B.)

REG. v. URIAH WEEKS. (a)

*Coining—Having possession of a mould—2 Will. 4, c. 24, s. 21—  
Guilty knowledge—Previous offence.*

*The prisoner, jointly with several others, was indicted for a felony viz., for knowingly and feloniously having in their custody and possession a mould (for coining) of the obverse side of a half-crown. The mould and other coining materials, and also all the persons charged, with the exception of the prisoner, were found and taken in a house occupied by the prisoner. At the time of the capture, the police were attacked, and attempts made to destroy the coining materials, and the prisoner came to the house, and entered the house, notwithstanding some of the others called out to him "that the police were there." He was then captured. It was also proved that the prisoner, about thirteen days before, had passed a bad half-crown, but it did not appear that that half-crown was made in the mould found in the house:*

*Held, that there was sufficient evidence to be left to the jury on the charge of felony, and that the evidence of the passing of the bad half-crown was admissible upon the trial of the felony to prove guilty knowledge.*

CASE reserved by Blackburn, J., for the opinion of this Court.

Uriah Weeks was indicted before me at the last Monmouth Assizes, along with John Loveridge, Elizabeth Loveridge, Mary Weeks, and Valentine Trew, for knowingly and without lawful excuse, feloniously having in their custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown.

On the trial it was proved that the prisoner Uriah Weeks had for about a month occupied a house in Pontypool. On the night of the 15th March the police went to that house, and on entering

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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—  
*Coining—Possession of  
moulds.*

found the prisoners John Loveridge, Elizabeth Loveridge, Mary Weeks, who was the wife of the prisoner Uriah Weeks, and Valentine Trew. The two men attacked the police and attempted to keep them at bay, whilst the two women snatched up something from the table which they threw into the fire. The police overpowered the men in sufficient time to preserve part of what the women were endeavouring to destroy, which proved to be fragments of a plaster of paris mould of a half-crown, parts of which were still wet.

The men, Loveridge and Trew, were taken in custody to the police station by some of the police, whilst the others remained to take charge of the women and search the house.

Uriah Weeks shortly afterwards came to the house. The women called out to him that the police were there. He nevertheless came in and was taken into custody.

On searching the house, which was a house with two rooms on each floor, a quantity of plaster of paris was found in a cupboard up stairs, along with several bottles containing liquids, and some bags with different powders in them; but no evidence was given of what their contents were. There was also found in a cupboard in a room down stairs an iron ladle, such as might have been used for melting metal, and on the hearth in one of the rooms up stairs was found a small portion of white metal, and amongst the cinders some plaster of paris moulds.

It was proved that Uriah Weeks had on the 2nd March, thirteen days before the night in question, passed a bad half-crown, but there was no evidence to show that the bad half-crown which he passed had been made in the mould found in his house on the 15th of March.

An objection was taken on behalf of Uriah Weeks, that there was no sufficient evidence to show that he had the possession of the moulds.

By 2 Will. 4, c. 24, s. 21, it is enacted that where the having any matter in the custody or possession is in that Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house, &c., whether occupied by himself or not, every such person shall be deemed to have such matter in his custody and possession within the meaning of that Act.

I left the case to the jury, who found the prisoner Uriah Weeks guilty, and in answer to a question from me said that they were satisfied that he knew the mould was in his house.

He was afterwards tried and convicted of uttering the base half-crown.

Sentence was passed upon him of twelve months' imprisonment for that offence, and concurrently with that imprisonment, penal servitude for three years for the felony; but, as I had some doubts whether there was sufficient evidence to justify a conviction on the felony, I respited the sentence of penal



servitude till the opinion of this Court could be obtained upon the point.

The question for the opinion of the Court is, whether there was sufficient evidence to be left to the jury on the charge of felony?

No counsel appeared for the prisoner.

*G. R. N. Somerset*, for the Crown, was stopped by the Court.

POLLOCK, C.B.—We are all of opinion that there was enough evidence to be left to the jury to enable them to say whether the mould was knowingly and feloniously, and without lawful excuse, in the custody and possession of the prisoner, and that the conviction for the felony must be affirmed. It was found in a house of which he was the master, and it was there apparently for a felonious purpose. In order to prove the *scienter*, evidence of other substantive offences of any sort having a tendency to prove guilty knowledge may be given. If a man is charged with the commission of one felony, and his commission of another offence has a tendency to prove guilty knowledge on his part, no doubt you may give evidence of that fact collaterally. This conviction, therefore, must be affirmed.

*Conviction affirmed.*

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*Coining—Pos-  
session of  
moulds.*

## COURT OF CRIMINAL APPEAL.

*Saturday, April 27, 1861.*

(Before POLLOCK, C.B., WILLIAMS, WILLES, and BLACKBURN, JJ., and WILDE, B.)

REG. v. JAMES TITE.(a)

*Embezzlement—Clerk or Servant—Commercial Traveller.*

*The fact of a commercial traveller, who was employed by the prosecutor, being paid by commission and being at liberty to obtain orders for others than the prosecutor, does not prevent him from being a servant to the prosecutor, liable to be indicted for embezzlement under the 7 & 8 Geo. 4, c. 29, s. 47.*

CASE reserved for the opinion of this Court by the Recorder of London.

At a session of the Central Criminal Court holden on the 28th day of January, 1861, James Tite was tried and convicted before me on an indictment which charged that he was servant to Richard Adams Ford, and by virtue of his employment as such servant he did receive the sum of 4*l.* 16*s.* 6*d.* in money, for and on account of the said Richard Adams Ford, his said master, and fraudulently and feloniously did embezzle, secrete and steal the said money.

It was proved that he was engaged by the prosecutor (who was a shirt manufacturer) as a commercial traveller, and that the agreement between them was that he should be paid by commission, and that he was at liberty to obtain orders for others than the prosecutor.

It was also proved that he received from the prosecutor various samples with which he set out on his journey, and that while on that journey he received by virtue of his employment the sum charged in the indictment, for which he did not account, but which he fraudulently appropriated to his own use. He never returned the samples entrusted to him, and was never seen by the prosecutor from the time he set out on his journey until he was taken into custody.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

The question on which I wish for the decision of the Court for consideration of Crown Cases Reserved is:—

Whether there was any evidence of the prisoner being a servant, as alleged in the indictment?

The prisoner remains in custody awaiting judgment.

RUSSELL GURNEY.

*Sleigh* for the prisoner.—It is submitted that there was no evidence that the prisoner was a servant of the prosecutor, as alleged in the indictment. His engagement was that of a commercial traveller, and is like that of the prisoner in *Reg. v. Walker* (1 Dears. & Bell. 600; S.C. 8 Cox Crim. Cas. 1.) In that case the prosecutors, manure manufacturers, engaged the prisoner, who kept a refreshment-house at B., to get orders which were supplied from their stores at B., under the prisoner's control. The rent was paid by the prosecutors, and the prisoner's duty was to collect money and pay it over at once; he was also to send in weekly accounts of sales and receipts. He was to be paid by commission, and was called agent for the B. district. The prisoner had signed a proposal to a guarantee society, which stated that his salary was 1*l.* per year, besides commission, and the prosecutors had agreed to give this salary of 1*l.* per year. It was held by the court that he was not a servant within the 7 & 8 Geo. 4, c. 29, s. 47, and that he could not be convicted of embezzlement.

POLLOCK, C.B.—Is not this question one of fact for the jury? A man may be employed as a tailor, and he may be the servant of the employer, but he may also be employed as a tradesman, and not as a servant. A commission agent is a separate and distinct occupation, but no doubt by agreement the nature of the occupation may be such that he may be the servant of his employer. There may be a servant who has the privilege of being employed by other people.

*Sleigh*.—There is no evidence of the existence of the relationship of master and servant here.

POLLOCK, C.B.—The evidence is ambiguous. It is quite consistent with the existence or non-existence of that relation.

BLACKBURN, J.—The question reserved, as I understand, is this, Do the two facts set out in the case, the payment by commission and the liberty to obtain orders for others than the prosecutor, conclusively show that the prisoner was not a servant?

*Sleigh*.—No doubt the view once taken that payment by commission prevents a person from being a servant is now exploded: and *Reg. v. Batty* (2 Moo. C. C. 257), contrary to the view expressed by Parke, B., in *Reg. v. Goodbody* (2 Car. & P. 667), decided that a person might be convicted of embezzlement as a servant, though at the same time he was employed by other persons. But on the facts stated in the case it is ambiguous whether the prisoner was a servant or not. He was not bound to obey the orders of Mr. Ford.

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WILLES, J.—Is not an ordinary commercial traveller bound to obey the orders of his employer as to the price, terms of payment, and such like matters?

*Sleigh*.—A man may well be a commercial traveller without being a servant.

WILDE, J.—The difficulty I feel is, that the case does not state what he was employed to do, but merely states compendiously that he was a commercial traveller.

BLACKBURN, J.—Can it be said that if a commercial traveller goes on a journey with samples, and is also to receive moneys for his employer, that there is not some evidence that he was a servant?

*Sleigh*.—He goes about the country as he pleases, and is not bound to get any orders. It is like the case of *Reg. v. May* (8 Cox Crim. Cas. 421; S. C. 30 L. J. 81, M. C.) where the prisoner was appointed by letter to get orders upon commission, and it was his duty to account for any money he might receive immediately on receipt of it, and it was held that this did not make him a servant within the statute. In that case Cockburn, C. J., said, "The position of clerk or servant implies control." Here it was not incumbent on the prisoner to obtain any orders for Mr. Ford. Here there is nothing *ejusdem generis* as a clerk or servant.

WILLIAMS, J.—I concurred in the judgment in that case, on the ground that it was not found to be any part of the prisoner's duty to receive money.

*McIntyre*, for the prosecution, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the conviction was right. The question arose at the trial whether there was any evidence of the prisoner's being the servant of the prosecutor as alleged in the indictment. The occupation of a commission agent is now perfectly well known; he may be employed by a number of persons for different purposes, and yet be the servant of none. Here the prisoner was employed as a commercial traveller by the prosecutor, to be paid by commission, but with permission to obtain orders for other persons. In our opinion that would not prevent him being servant to the prosecutor. We understand that the object of the Recorder in reserving this case was that the doubt which had been expressed by Mr. Baron Parke (now Lord Wensleydale) in *Reg. v. Goodbody* might be cleared up. That has now been cleared up, and the conviction must be affirmed.

WILLIAMS, J.—I am of the same opinion. The case of *Reg. v. Batty* not only decided that the prisoner was not the less a servant because he was employed by other persons at the same time, but that the employment for wages made him a servant. That is applicable to this case, unless the payment by commission makes a difference. That, however, is only a mode of receiving wages.

WILLES, J.—I am of the same opinion.

BLACKBURN, J.—I am of the same opinion.

WILDE, J.—I am of the same opinion. The case of *Reg. v. May* is an authority in favour of the conviction, for Cockburn, C.J., there says a traveller is under the control of his several employers, he is bound to go here and there, and to do this and that according to orders.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*April 27th, 1861.*

(Before POLLOCK, C.B., WILLIAMS, WILLES and BLACKBURN, JJ.  
and WILDE, B.)

REG v. OWEN PRITCHARD. (a)

*Larceny—Ownership of property—Joint-stock bank—7 Geo. 4, c. 46, s. 9—7 Geo. 4, c. 64, s. 14.*

*In an indictment for larceny the property was laid to be in J. C. G., the manager of the Dudley and West Bromwich Bank. The property belonged to the banking company, a joint-stock company consisting of more than twenty partners, but no registration of it or appointment of any manager or public officer was proved. The indictment was amended at the trial, by laying the property in P. W. and others, P. W. being one of the partners:*

*Held, that the ownership, as amended, was rightly laid under 7 Geo. 4, c. 64, s. 14, and that it need not have been laid in the public officer (presuming there to have been one), under 7 Geo. 4, c. 46, s. 9.*

CASE stated by Channell, B., for the opinion of this Court. The prisoner, Owen Pritchard, was convicted before me, at the last Assizes for Denbighshire, of stealing 8lbs. weight of brass. The conviction is to be taken to be correct, subject only to the question whether the indictment sufficiently describes the ownership of the property which is the subject thereof.

The property charged to be stolen consisted of certain brasses or caps which had formed part of an engine and machinery used in

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law,

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the working of colliery works, known as "The Llywernian Colliery Works."

The indictment on which the prisoner was arraigned, and to which he pleaded, described the property as the property of "John Cleveland Green."

Edward Green was called as a witness for the prosecution. He swore, "that he was the son of John Cleveland Green; that John Cleveland Green was the manager of the Dudley and West Bromwich Bank; that he was sent by his father to reside near the colliery works; that he had the engines and works belonging to the colliery under his care at the time when the brasses and caps were severed and taken from the machinery; that he could not actually say that he was a servant of the company, but that he received from his father payment for taking charge of the machinery and works; that he believed the money came from the company; that with money he got from his father he paid the men on the works; and that the engines and machinery belonged to the Dudley and West Bromwich Company."

No registration of the Dudley and West Bromwich Company as a joint-stock company, or of the appointment of any manager or public officer thereof, was proved.

It was objected by the prisoner's counsel that the ownership of the property in John Cleveland Green was not proved.

The witness stated that Philip Williams was one of the partners in the Dudley and West Bromwich Bank; that there were more than twenty partners or shareholders in the bank; and that it was, as he understood, a joint-stock banking company.

I was thereupon requested to amend the indictment. I did so by striking out the words John Cleveland Green, and stating the property to be the property of "Philip Williams and others."

The prisoner was convicted and sentenced, and is now undergoing his sentence.

On the same day on which he was tried, and shortly before the verdict was recorded, my attention was called by the prisoner's counsel to the statutes and cases collected in Archbold's Criminal Law, 14th edit., pp. 36 and 37.

I then reserved for the opinion of this Court the question whether, upon the evidence set out, the ownership of the property was sufficiently described in the indictment as amended; and if not, whether the description in the indictment before the amendment was made was sufficient, if that question could after the amendment be properly reserved.

The question submitted is, whether the indictment as amended, or as it stood before amendment (supposing it can in its original form be referred to), sufficiently described the ownership of the property according to the evidence, to sustain the conviction?

W. F. CHANNELL.

*McIntyre*, for the prisoner.—It is submitted that, after the amendment had once been made, and the verdict recorded, the judge had no power to amend further, and that the property was

wrongly laid to be in Williams and others. It ought to have been laid to be in the public officer of the banking company. The 39 & 40 Geo. 3, c. 28, s. 15, provides that no other bank than the Bank of England shall be established or allowed by Parliament, and that it shall not be lawful for any number of persons exceeding six to issue notes payable on demand at any less time than six months, during the continuance of the privileges granted by that Act to the Bank of England. Then, taking this to be a joint-stock company, and to consist of more than six partners, it must have a public officer according to the 7 Geo. 4, c. 46, s. 4. And then sect. 9 enacts, "That all indictments, informations and prosecutions by or on behalf of such co-partnership for any stealing or embezzlement of any money, goods, effects, &c., or other property of or belonging to such copartnership, or for any fraud, forgery, or crime or offence, committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred and carried on in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership."

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WILLES, J.—Under the 7 & 8 Vict. c. 113, the property may be laid to be in the body corporate.

McIntyre.—But there is no evidence that this company was incorporated under the 7 & 8 Vict. c. 113.

POLLOCK, C.B.—May any one go and steal their property if they have not appointed a public officer?

WILDE, J.—That is, if they have not complied with the statute.

McIntyre.—It is to be assumed that the company has acted legally and appointed a public officer. The words "shall and may" in the 9th section are obligatory; and in *Chapman v. Milvain* (5 Ex. 61), where all the cases upon this point were reviewed, it was held that a joint-stock banking company under the 7 Geo. 4, c. 46, were bound to sue in the name of their public officer. In *Reg. v. Beard* (8 C. & P. 143), which was referred to in the judgment in *Chapman v. Milvain*, Coleridge, J., intimated an opinion that a registered joint-stock banking company was not bound to prosecute in the name of their public officer, but the point was not argued.

BLACKBURN, J.—How do you reconcile your construction of the 7 Geo. 4, c. 46, s. 9, with sect. 14 of the subsequent Act, 7 Geo. 4, c. 64? "And in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners, be it enacted, that in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be, &c.; and this provision shall be construed to extend to all joint-stock companies and trustees."

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*McIntyre.*—That means all ordinary joint-stock companies, not such an one as this, regulated by a peculiar statute. In Archbold's "Pleading and Evidence in Criminal Cases," p. 35, 12th edit., it is said that it would seem now to be settled that the property must be laid in the public officer of the company. 2 Russ. on "Crimes," 104, was also referred to.

*V. Williams*, for the prosecution, was not called upon to argue.

POLLOCK, C.B.—We are all of opinion that the question submitted to us, whether the indictment as amended sufficiently described the ownership of the property, must be answered by saying that it did. The 7 & 8 Geo. 4, c. 64, s. 14, expressly applies to the case of partnership and joint owners, and to all joint-stock companies and trustees, and provides that it shall be sufficient to name one of such persons, and to state such property to belong to the person so named and another or others, as the case may be. It cannot be supposed that, although their banking business may not have been carried on according to law, they were not possessed of the property. They were the possessors of it, and the possession of it was properly laid to be in the one partner named and others, within the meaning of the 7 Geo. 4, c. 64, s. 14. The conviction, therefore, will stand.

WILLIAMS, J.—I am of the same opinion. *Chapman v. Milvain* would bind us to the extent that in a civil action the words "shall and may," in 7 Geo. 4, c. 46, s. 9, are imperative, and that an action cannot be maintained in such a case in the name of any other person than the public officer. But the question is, whether that decision applies to an indictment. The 7 Geo. 4, c. 64, s. 14, makes it plain that it does not, and that an indictment which states the property to belong to one member by name, and others, is good. That provision, it is expressly enacted, shall be construed to extend to all joint-stock companies. This is a joint-stock company, and the 7 Geo. 4, c. 64, s. 14, is the last provision on the subject.

The rest of the Court concurring,

*Conviction affirmed*



## COURT OF CRIMINAL APPEAL.

June 1, 1861.

(Before COCKBURN, C.J., POLLOCK, C.B., MARTIN, B.,  
WILLES, J., and WILDE, B.)

REG. v. JOHN PARKER AND GEORGE PARKER. (a)

*Confession—Inducement by accomplice—Presence of prosecutor and police.*

*A policeman and the prosecutor went into a room where the prisoners were, and the policeman charged one with stealing the prosecutor's hops, and the other with receiving them, knowing them to be stolen. A third person in company with the prisoners, who was also at the same time charged by the policeman with the stealing, said to one of the prisoners, "Well, John, you had better tell Mr. W. (the prosecutor) the truth." Neither the prosecutor nor the policeman dissented or remarked upon this advice, whereupon the prisoner John made a statement in the nature of a confession:*

*Held, that this statement was admissible in evidence, the circumstances not being such as to exclude or protect it as a privileged communication.*

**JOHN PARKER** and George Parker were tried before me at the last General Quarter Sessions for the county of Denbigh, on an indictment charging, in the first count, the prisoner John Parker with stealing a quantity of hops, the property of Peter Walker, his master, and in the second count, George Parker with receiving the same hops, knowing them to have been stolen.

It was proved at the trial that the prisoner John and a brother named William Parker were in the service of the prosecutor, who was a brewer in Wrexham, and the prisoner George kept a public-house in Wrexham. On the 6th March a policeman named Lamb went to George Parker's house, where John and William then were, and by permission of George searched the house. Lamb found some hops in two bags in a room up stairs. He came

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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down stairs, and sent for Mr. Walker, the prosecutor, who went with Lamb into a parlour in George's house, in which were assembled John, William, and George Parker. Lamb there charged William and John with stealing the hops, and George with receiving them, knowing them to be stolen. Upon hearing this William said, "Well, John, you had better tell Mr. Walker the truth." Neither the prosecutor nor the policeman dissented from or remarked upon William's advice, whereupon John said, "I will tell the truth; I did take some hops and I must risk it." Lamb then took the three brothers to the Bridewell, and on their way there John of his own accord said: "I'll tell you how I got them hops in the small bag. I was putting some in the cask, and there was more than I wanted, and I took them. I did not think it was any harm."

The three brothers were shortly afterwards taken before the magistrates, when William was discharged, but John and George were committed for trial.

At the trial it was objected by the counsel for the prisoners, upon the authority of *Reg. v. Sarah Taylor*, 8 Car. & P. 733 (a); *Rex v. Spencer*, 7 Car. & P. 776 (b); and *Rex v. Pountney*, 7 Car. & P. 302 (c), and other cases which he then cited, that the confession of John, being one continuing confession, ought not to be received in evidence, as being made after an inducement to confess. That, although the inducement was not made by a

(a) In *Reg. v. Sarah Taylor's* case the facts were these:—Upon an indictment for setting fire to the house of R. Lyford, it appeared that on the morning of the fire the prisoner, who was the servant of the prosecutor, was sent for into the parlour, in which Mrs. Lyford and Mr. Winders were, and that Mr. Winders, who was not a constable, or in any office or authority, said to the prisoner, "You had better tell how you did it," and that thereupon she made an answer. Patteson, J., said, "It was the opinion of the judges that evidence of any confession is receivable unless there has been some inducement held out by some person in authority, and in this case I should have received the evidence of the statement made to Mr. Winders, if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. Lyford, who was the wife of the prosecutor, and also the mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that therefore the evidence is inadmissible."

(b) In *Rex v. Spencer*, 7 C. & P. 776, it was proved that after the prisoner David Spencer was in custody, he was told by a person who was neither prosecutor nor constable, nor had any authority of any kind, that it would be better for him to confess, and that upon that, he made a statement. Parke, B.—"Mr. Carrington, if you wish me to receive evidence of this confession I will do so; but I ought to tell you that there is a difference of opinion among the judges whether a confession made to a person who has no authority after an inducement held out by that person is receivable. Some of the judges think it is receivable, and others think that it is not so. If I receive it I shall reserve the point for the consideration of the judges, and if they should think that I should not have received it, the prisoner will be pardoned. If you have no other evidence I certainly will receive it, but if you have, you will consider whether you had better press it."

(c) In *Rex v. Pountney* the constable who took the prisoner Pountney into custody was called to prove a confession made by the prisoner to the landlord of the inn to which he was taken immediately after his apprehension. It appeared that the constable was present, and had the prisoner in his custody when the confession was procured by inducements held out by the innkeeper, and that the constable who was present did not caution the prisoner in any way. Alderson, B.—"This is a point well worthy of consideration. I have a very strong opinion against its admissibility, but as there are opinions which I am bound to respect opposed to my own, I think I had better receive the evidence, and if it should become necessary I will reserve the point for the consideration of the judges."

person in authority, yet being made in the presence and hearing of two persons in authority, namely, the prosecutor (prisoner's master) and the policeman who had just charged the prisoner, they had by their silence acquiesced in and adopted the inducement, and, that as there was no other evidence of the stealing, John could not be convicted of stealing, and George must consequently be acquitted of receiving.

I directed the jury that the inducement or advice being that of a person made at the time when he himself was charged with a similar offence as the person induced to confess, must be looked upon merely as the inducement of an accomplice; and that there having been no threat or promise of favour with respect to the offence charged against the prisoner held out by any person concerned in apprehending, examining, or prosecuting him, or by the person to whom the subsequent confession was made, there was nothing to exclude or invalidate it.

The jury found John guilty of stealing, and George of receiving, but I deferred sentencing them until the opinion of the Court of Criminal Appeal should have been taken upon the point raised by the prisoner's counsel.

If the confession was under the circumstances receivable the conviction to stand, otherwise the prisoners to be acquitted.

The prisoners are out on bail.

THOMAS HUGHES, Chairman.

No counsel appeared to argue on either side.

By the COURT,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*April 27th, 1861.*(Before POLLOCK, C.B., WILLIAMS, J., WILLES, J.,  
BLACKBURN, J., and WILDE, B.)

REG. v. JAMES BRAMLEY. (a)

*Larceny—False pretence—Obtaining goods by an artifice.*

*Prisoner went to a colliery professedly to buy a load of the best soft coal; the cart was accordingly loaded by the prosecutor's servant with that description of coal. It was the prisoner's duty then to have gone with the cart to the weighing machine and had it weighed, and then to have paid the weighing clerk for it. He, however, previously to going to the weighing machine, covered over the top of the coal in the cart with a very inferior description of coal called "slack," and then went with the cart to the weighing machine and told the weighing clerk that he had got "slack;" the clerk weighed the cart and charged for it as containing "slack" only. The prisoner paid for the coal as "slack," and left the colliery:*

*Held, that the property in the soft coal had not been parted with, and that the prisoner could be convicted of larceny.*

CASE reserved for the opinion of this Court:—

At the last Nottinghamshire Quarter Sessions held at Nottingham, James Bramley was indicted for feloniously stealing, on the 19th day of November last, at Basford, 15 cwt. of coal, of the value of 8s. 6d., the property of Thomas North.

The prosecutor was the owner of a colliery. The prisoner was a higgler, and in the habit of coming to the colliery to purchase coal. Both coal and small coal or slack were sold by retail at the colliery to higglers and others, but it was proved that none (except to certain private customers of Mr. North, with whom an account was kept) was allowed to be taken away until it had been paid for, and that when the carts were loaded they were taken to the prosecutor's weighing machine in the colliery yard, where the weight and price of the coals having been ascertained, the coals

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

were paid for to the prosecutor's clerk in charge of the weighing machine.

The weighing machine is at the entrance of the prosecutor's yard, and so placed that carts entering and passing out of the yard have to pass the machine, and within view of the clerk in charge of it, and as the carts go into the yard empty they are weighed. On returning loaded they are again weighed, and from the gross weight so ascertained the weight of the empty cart is deducted, and the residue is taken to be the net weight of the coals in the cart.

The prisoner, having frequently before the day in question fetched coals from the prosecutor's yard, was acquainted with the above regulations, and knew that he would not be permitted to take coals out of the yard until they had been weighed and paid for as above mentioned.

The price of soft coal was about double that of slack.

On the day named in the indictment, the prisoner brought his cart to the colliery, and said, "I want a load of the best soft coal." The cart was loaded with the best soft coal by a servant of the prosecutor, whose business it is to load the carts of the customers, assisted by the prisoner himself.

Having finished loading the coals, the prosecutor's servant went away to his work in another part of the yard, leaving the prisoner to take his cart to the weighing machine to be weighed, which ought at once to have been done.

Near the place where the coals was so loaded was a heap of slack, and after the prosecutor's servant had left the prisoner, as before mentioned, the prisoner (as appeared by a statement subsequently made by him) placed a quantity of this slack on the top of the load of soft coal, thereby covering over the coal and making the cart appear to be loaded with slack only.

The prisoner then took the cart to the weighing machine, and the clerk in charge of the machine said to the prisoner, "What have you got?" He said, "slack." The clerk, seeing only slack in the cart thereupon weighed the cart, and charged the prisoner for the load as slack, and the prisoner paid such charge and went away with his cart. Had the cart contained slack only, the amount paid by the prisoner was all that would have been due from him; but, as the fact was, the sum paid by the prisoner was considerably less than the real price of the load.

Shortly after the prisoner had gone away, the weighing clerk having communicated with the prosecutor's servant, who had loaded the prisoner's cart with the coal, as before mentioned, sent after the prisoner, who was overtaken with the cart on the highway, proceeding towards Nottingham. The prisoner returned with the messenger to the prosecutor's yard, and was charged by the clerk with obtaining soft coal as slack. The prisoner said to the clerk, "What's the difference and I will pay you, and we will have no more bother about it?" The clerk said, "Oh, shan't we?" Prisoner said, "It's the first time I have done anything of the kind before, and I'll never try it any more." The clerk told the prisoner

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the difference in the price between slack and the best soft coal, and the prisoner paid the clerk. The prisoner said, "You have not said anything about it, have you?" The clerk said, "I have, and shall say more." The prisoner then went away, and the clerk gave information of the facts to his employer.

The prisoner's counsel submitted that there was no case to go to the jury to charge the prisoner with stealing the coal, and that if there was any offence committed, it would be obtaining the coal under false pretences.

The Court overruled this objection, and told the jury that if they were of opinion that, the prisoner at the time when he went to the colliery for the coal intended fraudulently to take the same away and appropriate it to his own use, on paying for the soft coal the price of slack only, and that he actually carried out his intention by fraudulently placing slack over the soft coal, and making the false representation above mentioned to the weighing clerk, they might convict the prisoner of larceny of the coal.

The jury found the prisoner guilty of larceny, but the court of quarter sessions respited judgment until the next quarter sessions, and discharged the prisoner upon his own recognizance, with two sureties, to appear at the next sessions to receive judgment, should the Court for Crown Cases Reserved be of opinion that he was properly convicted.

The opinion of the Court for the consideration of Crown Cases Reserved is requested whether the prisoner was rightly convicted of larceny?

*Cave*, for the prisoner.—It is submitted that the conviction of the prisoner for larceny was wrong. Although the evidence might be sufficient to support an indictment for obtaining the coal by false pretences, the authorities show that it is not sufficient to support larceny. The distinction between false pretences and larceny is laid down in 2 East, P. C. 688, and a number of cases cited, which show that where the intention of the prosecutor is to part with the property in the thing obtained by the prisoner, it is a case of false pretences; and where the intention is to part with possession only of the property, it is a case of larceny. In *Reg. v. Parkes* (2 East P. C. 67), the defendant bought goods and desired them to be sent to him with a bill and receipt, and the shopman who took them left them upon being paid for them by two bills, which turned out to be mere fabrications. The Judges held that this was not larceny, because the prosecutor had parted with the property as well as the possession. So in *Reg. v. Jackson* (Russ. & Moo., 119), where the prisoner was indicted for stealing a diamond brooch and other articles, and it appeared that they had been pledged, and that the prisoner obtained them and some money from a pawnbroker's servant, by pretending to deposit another pledge of greater value in lieu of them, it was held that it was not larceny because the servant, who had a general authority from the master, parted with the property and ownership, and not merely with the possession.

WILLIAMS, J.—The difference between that case and the present is this, the pawnbroker's servant, having a general authority, was induced to part with the property in the old pawn; but in the present case the cart was not to be allowed to go out of the prosecutor's yard without payment of the price of the coal.

*Cave.*—This is the converse of the ordinary case of obtaining money by false pretences. The Court must be satisfied that the prisoner could not have been convicted of obtaining the defendant's coal by false pretences. If the soft coal had been of nearly the same value as the slack, would it have amounted to larceny? Here there is strong reason for saying that the property in the soft coal had been parted with.

WILDE, J.—Suppose the case of a shop, in one part of which the customer selects the goods, and then has to take them to another part for the purpose of having the bill made out and paying for them, but that instead of taking the goods to that part to have the bill made out and paying for them, the man slips away with the goods without paying for them.

*Cave.*—In such a case there would be no consent at all to the man's taking away the goods.

WILDE, J.—Here the weighing clerk consented only to the carrying away slack, not the soft coal which was invisible.

*Cave.*—Here it is contended, the clerk intended to part with the cart load of coal which was standing before him.

*Boden*, for the prosecution, was not called upon to argue.

POLLOCK, C.B.—We are all of opinion that the conviction was right. This case does not at all differ from that which was suggested by my brother Wilde—viz., where a man receives goods in one part of an establishment, and has to take and pay for them in another part, but he slips away without paying for them. In such a case it cannot be said that the goods are absolutely delivered to him, and if not, the man acquires no property in them. In this case the soft coal was delivered to the prisoner by the prosecutor's servant, for the purpose of being taken to the weighing machine to be weighed and there paid for. The prisoner, when the servant was away, covered the soft coal with slack, and took it to the weighing machine, and caused it to be weighed and paid for as slack. It cannot be said that there was any permission to take away the soft coal, or that it was paid for or delivered. Suppose the case of a mine consisting partly of silver and partly of lead, if a man professing to take away a certain quantity of silver, were to cover it over with lead and then smuggle it out and pay for it as lead only, that would be merely a mode of concealing and stealing the silver.

WILLIAMS, J.—I am of the same opinion. It was contended that this is a case of false pretences, and not a case of larceny; but the distinction has been settled to be that, where the owner of property, by means of a trick or subterfuge, is induced to part with the possession, it amounts to larceny; but where he intends to part with the property, it is a case of false pretences. In the

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*False pretences*  
—*Larceny.*

present case the jury have found that the prisoner went to the colliery with a preconceived and dishonest intention of obtaining possession of the soft coal; and having so obtained it, instead of taking it to the weighing machine to be weighed, and paying for it as soft coal, he used the artifice of covering it over with slack, and by that trick altogether prevented the weighing clerk from seeing the soft coal which was beneath the slack. The prisoner had no permission to take away the soft coal without paying for it; and indeed the weighing clerk was altogether ignorant of the fact that any soft coal was beneath the slack. Instead of obtaining any property in the soft coal, the prisoner obtained the possession of it merely. The case was, therefore, one of larceny.

The rest of the Court concurring,

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

June 1, 1861.

(Before COCKBURN, C.J., POLLOCK, C.B., MARTIN, B., and CROMPTON and WILLES, JJ.)

REG. v. WILLIAM SLEEP. (a)

*Government stores—Mark of broad arrow—Possession without knowledge of the mark—9 & 10 Will. 3, c. 41, s. 2.*

*On an indictment charging the defendant under the 9 & 10 Will. 3, c. 41, s. 2, with being in possession of naval stores marked with the broad arrow, it is necessary for the prosecution to show affirmatively a possession by the defendant with knowledge that they were marked with the broad arrow.*

*But such knowledge may be presumed from the circumstances attending the possession.*

CASE reserved for the opinion of this Court:—

At the General Quarter Sessions of the peace for the borough of Plymouth, holden on the 4th of April, 1861, before

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



Charles Saunders, Esq., the Recorder, William Sleep was tried and convicted on an indictment charging him upon the 2nd section of the statute 9 & 10 Will. 3, c. 41, with having been found in possession of naval stores marked with the broad arrow.

The indictment was in the following form:—

The jurors for our Lady the Queen, upon their oath present, that William Sleep, late of the parish of Saint Andrew, in the borough of Plymouth, plumber, on the 9th day of March, 1861, with force and arms at the parish aforesaid, in the borough aforesaid, unlawfully had in the custody, possession, and keeping of him the said William Sleep certain naval stores marked with the mark usually used to and marked upon such like naval stores of our said Lady the Queen, (that is to say) eight pounds weight of copper bolts, each of the said copper bolts being stamped and marked with the broad arrow; eight pounds weight of pieces of copper bolts, each of the said pieces of copper bolts being stamped and marked with the broad arrow; and eight pounds weight of pieces of copper, each of the said pieces of copper being stamped and marked with the broad arrow, which said naval stores so stamped and marked as aforesaid were then and there found in the custody, possession, and keeping of him the said William Sleep, he the said William Sleep not being a contractor with the principal officers or commissioners of our said Lady the Queen, of the navy, ordnance, or victuallers for the use of our said Lady the Queen, or employed by any contractor with the principal officers or commissioners of our said Lady the Queen, of the navy, ordnance, or victuallers for the use of our said Lady the Queen, and he the said William Sleep, not being a contractor with the principal Secretary of State for the war department or with the commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, for the use of our said Lady the Queen, or employed by any contractor with the said principal Secretary of State or the said last mentioned commissioners for the use of our said Lady the Queen to make any stores of war or naval stores whatsoever, to the diminution of the naval stores of our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

The prisoner was an ironmonger and brazier at Plymouth. On the 9th of March he delivered upon the quay to the captain of a coasting vessel, the *Active*, a cask to be carried from Plymouth to Helston, in Cornwall. The cask was marked "R. P." in chalk; but, on being asked for better directions, the prisoner gave to the captain a piece of paper on which was written "Richard Pascoe, Helston, Cornwall." Before the vessel sailed, two of the metropolitan police employed at the Dockyard, Devonport, seized the cask, which, on being opened, was found to contain 324lbs. weight of copper bolts in 150 pieces.

The cask was packed with straw and shavings, and each piece or bolt was packed with straw and shavings separately, so that

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the pieces could not rub together or make any noise. The whole of the metal had the appearance of Government stores, and of such stores as are not allowed to be sold in the Dockyard. The greatest portion of it had been passed through the fire, and round bolts had been very nearly beaten square. On some of the pieces the mark of the broad arrow was visible in the state in which they were found; from others it was necessary to clear off the rust before it could be seen. A little over 50lbs. weight of the copper was marked with the broad arrow.

After the seizure the prisoner was charged by the police with delivering a cask containing Government stores to the captain of the *Active*. The prisoner said: "Well, I did deliver a cask of metal, but I did not think it was marked." The prisoner was also told that the cask of metal was wrapped in shavings and straw, and he said, "Yes it is. I packed it myself. I do that to keep it from knocking the head of the cask out, as I have had complaints before, as some of the casks on their arrival had their heads out." After this the cask of metal was shown by the police to the prisoner, who was asked whether that was the cask he delivered to the captain. "Yes," he said, "I have no doubt of it." The prisoner was then shown the mark of the broad arrow on some of the pieces, and asked how he became possessed of the copper, and he said, "No, he did not know of whom he bought it."

There was no evidence given to justify or account for the prisoner's possession of the copper.

Upon these facts Mr. Carter strenuously urged upon the jury, that in order to convict the prisoner it must be shown for the prosecution, not only that the prisoner had the marked copper in his possession, but that he also knew that the copper was marked with the broad arrow, citing a report of *Reg. v. Cohen* (8 Cox Crim. Cas. 41), and contending that this had not been done.

As prosecutions on the 2nd section of the statute 9 & 10 Will. 3 are very frequent and important at Plymouth, and as cases of culpable ignorance and culpable negligence are as much within the mischief guarded against by the Legislature, as where a particular knowledge of the Queen's mark upon the stores can be proved in the possessors, and as it has been held that possession of marked stores, to be excused, should be without any fault or misbehaviour in the possessor,

The Recorder asked the jury:

First. Whether the prisoner was found in possession of copper marked with the broad arrow? To which the foreman answered "Yes."

Secondly. Whether the prisoner knew that the copper, or any part of it, was so marked? To which the jury said, "We have not sufficient evidence before us to show that he knew it."

Thirdly. Whether the prisoner had reasonable means of knowing that it was so marked? To which they answered, "He had."

Upon this finding of the jury, a verdict of guilty was recorded ; and the question is respectfully submitted to the Court for the consideration of Crown Cases Reserved, whether the verdict is right.

Judgment was respited, and the prisoner discharged upon bail to appear at the next quarter sessions for the borough.

CHARLES SAUNDERS,

Recorder of Plymouth.

The following statutes were referred to during the argument :

The 9 & 10 Will. 3, c. 41, s. 2, enacts that such person or persons in whose custody, possession, or keeping such goods or stores marked as aforesaid shall be found, not being employed as aforesaid, and such person or persons who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of the having such goods found in his custody, possession, or keeping, shall forfeit such goods and the sum of 200*l.*, together with the costs of prosecution, one moiety to his Majesty and the other moiety to the informer, to be recovered as aforesaid, and shall also suffer imprisonment until payment and performance of the same forfeiture, unless such person shall upon his trial produce a certificate under the hand of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, qualities, or weights of such goods as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession.

The 39 & 40 Geo. 3, c. 89, s. 1, enacts, that every person or persons (such person or persons not being a contractor or contractors, or employed as in the said recited Act of the ninth and tenth years of the reign of King William the Third is mentioned) who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered to any person or persons whomsoever, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping any stores of war or naval, ordnance, or victualling stores, or any goods whatsoever marked as in the said recited Acts are expressed, or any canvas marked either with a blue streak in the middle or with a blue streak in a serpentine form, or any bewper, otherwise called buntin, wrought with one or more streaks of raised tape (the said stores of war, naval, ordnance, or victualling stores, or goods above mentioned, or any of them being in a raw or unconverted state, or being new or not more than one-third worn), and such person or persons who shall conceal such stores or goods, or any of them marked as aforesaid, shall be deemed receivers of stolen goods, knowing them to have been stolen, and shall, on being convicted thereof in due form of law, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm, unless such person or persons shall upon his, her, or

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their trial produce a certificate under the hands of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities, or weights of such stores or goods as he, she, or they shall then be indicted for, and the occasion and reason of such stores or goods coming to his, her, or their hands or possession.

Sect. 2 enacts that such person or persons (not being a contractor or contractors, or employed as aforesaid) in whose custody, possession, or keeping any of the said stores called canvas, marked with a blue streak in a serpentine form, or bewper, otherwise called buntin, wrought as above mentioned, shall be found (such canvas or bewper, otherwise called buntin, being charged to be new or not more than one-third worn), and all and every person or persons who shall be convicted of any offence contrary to so much of the said recited Act of the 9th and 10th years of the reign of King William the Third, as relates to the making, or the having in possession, or concealing any of his Majesty's warlike or naval or ordnance stores marked as therein specified, shall besides forfeiting such stores and the sum of 200*l.*, together with costs of suit as therein mentioned, be corporally punished by pillory, whipping and imprisonment, or by any and either of the said ways and means, in such manner and for such space of time as to the judge or justices before whom such offender or offenders shall be convicted shall seem meet, anything in the said last-mentioned Act, or in the before-recited Acts of the 9th year of King George the First, and the 17th year of King George the Second, to the contrary thereof in anywise notwithstanding.

*Carter* for the prisoner.—The case depends on the 9 & 10 Will. 3, c. 41, s. 2, and the question is whether knowledge of the mark of the broad arrow being on the stores is an essential ingredient to the commission of the offence created by that enactment. It is submitted that it is, and that the finding of the jury on the second question entitles the prisoner to an acquittal, and that the finding on the third question is immaterial.

MARTIN, B.—Is the finding on the first question right? The cask was found in the possession of the captain of the ship.

*Carter*.—That point was raised before the jury, and ought to have been reserved also.

By the COURT.—We can only take the case as stated to us by the Judge.

POLLOCK, C.B.—I own I doubt whether the practice of courts, of putting questions of fact to the jury in criminal cases, and then pronouncing a verdict of guilty or not guilty, instead of the jury, is right. It is a sort of special verdict.

CROMPTON, J.—The judge asks the court whether the verdict is right; that seems to involve everything.

COCKBURN, C.J.—The question really is, whether stores having been found in the prisoner's possession without his knowledge of their having the mark of the broad arrow upon them, any offence has been committed.

CROMPTON, J.—Whether guilty knowledge should be proved affirmatively on the part of the prosecution.

*Carter*.—On that question there are decisions in favour of the prisoner: *Reg. v. Wilmott* (3 Cox Crim. Cas. 281), and *Reg. v. Cohen* (8 Cox Crim. Cas. 41).

*Collier* (*Holdsworth* and *E. W. Cox* with him).—In a case at the Maidstone Spring Assizes, 1861, Wightman, J., ruled that it was not necessary to show affirmatively that the prisoner had knowledge of the mark of the broad arrow being on the stores.

POLLOCK, C.B.—Suppose a man to bring a cask or a portmantau, and to ask permission to leave it in a house, would the occupier be within the statute because it might happen to contain Government stores marked with the broad arrow?

COCKBURN, C.J.—Or if a man were to bring a quantity of copper bolts for sale, and among them three or four marked with the broad arrow, would he be within the section?

*Collier*.—*Prima facie* if a man has possession of any stores marked with the broad arrow, he is within the statute, and a case is made out which calls on the prisoner for an answer.

COCKBURN, C.J.—*Actus non facit reum, nisi mens sit rea*, is the foundation of all criminal justice.

CROMPTON, J.—Suppose a man were to impose upon another by putting at the top a quantity of stores not marked, and in the middle some marked with the broad arrow, would the man imposed upon come within the Act? If not, that supposition seems to arise upon this finding.

*Collier*.—In such a case they could not be said to be in his possession, as he was not aware of it. There will be the greatest possible difficulty in protecting the public stores if it is held that knowledge of the mark of the broad arrow must be proved. In *Rex v. Banks* (1 Esp. 144) Lord Kenyon said that in prosecutions under the 9 & 10 Will. 3, c. 41, it was sufficient for the Crown to prove the finding of the stores with the King's mark in the defendant's possession, to call upon him to account for that possession and the manner of his coming by them, so that, of course, the onus lay on the defendant of proving that he had legally become possessed of them. And in *Morden, appellant, v. Porter, respondent* (29 L. J., M.C. 213) it was held that it was not necessary in order to support a conviction under the 1 & 2 Will. 4, c. 32, s. 30, for a trespass in pursuit of game, that the defendant should have intended to commit or have been conscious that he was committing a trespass. 2 East's P. C., s. 133, was also cited.(a) The intent of the

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(a) A widow woman was indicted before Mr. Justice Foster upon the Western Circuit, on the stat. 9 & 10 Will. 3, c. 41, for having in her custody divers pieces of canvas, marked with the king's mark in the manner described in the Act, she not being a person employed by the Commissioners of the Navy to make the same for the king's use. The canvas was marked as charged in the indictment, and was clearly proved to be such as was made for the use of the navy, and to have been found in the defendant's custody. The defendant did not attempt to show that she was within any exception of the Act as being a person employed to make canvas for the use of the navy, nor did she offer to produce any certificate from any officer of the Crown touching the occasion and reason of such canvas coming into her possession. Her defence was that when there happened to be in his Majesty's stores a considerable quantity of

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statute was to dispense with the ordinary proof of guilty knowledge in these cases, and to throw on a man having possession of stores marked with the broad arrow the onus of showing that he came by them lawfully.

COCKBURN, C.J.—I am of opinion, on the case as submitted to us, that we must say that the prisoner was wrongly convicted. I certainly feel bound to say, that there was evidence upon which the jury might well and reasonably have been called upon to conclude, that the prisoner knew that the copper bolts were marked with the broad arrow while in his possession. But the jury have not so found. And we must consider the case now as if it had been proved that the defendant was ignorant of that fact. It has been contended that the mere possession of stores marked with the broad arrow is sufficient to constitute the offence within the statute of 9 & 10 Will. 3, c. 41. I cannot adopt that view. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into that statute, as it was held in *Reg. v. Cohen*, where this conclusion of the law was stated by Hill, J., with his usual clearness and power. It is true that the statute says nothing about knowledge, but that must be imported into the statute. Many cases may be put in which persons might have possession of stores, and in which it is clear to demonstration that they might be ignorant of the fact of their having the mark of the broad arrow upon them, and yet the argument of the prosecution would lead to their being found guilty. I quite agree that the jury might well have come to

old sails no longer fit for that use, it had been customary for the persons entrusted with the stores to make a public sale of them in lots larger or smaller as best suited the purpose of the buyers, and that the canvas produced in evidence, which happened to have been made up long since, some for table linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant, and had been used in the same public manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen. This sort of evidence was strongly opposed by the counsel for the Crown, who insisted that as the Act allows of but one excuse, the defendant unless she could avail herself of that, could not resort to any other. That if the canvas were really bought of the Commissioners, or of persons acting under them, there ought to have been a certificate taken at the time of the purchase, and the second section admits of no other excuse. But the judge was of opinion that though the clause of the statute which directs the sale of these things had not pointed out any other way for indemnifying the buyer than the certificate, and though the second section seemed to exclude any other excuse for those in whose custody they should be found, yet still the circumstances attending every case which might seem to fall within the Act ought to be taken into consideration, otherwise a law calculated for wise purposes might be too rigid a construction, if it be made a handle for oppression. There was no room to say that this canvas came into the possession of the defendant by any act of her own. It was brought into family use in the lifetime of her husband, and it continued so to the time of his death, and by act of law it came to her. Things of that kind had been frequently exposed to public sale; and though the Act pointed out an expedient for the indemnity of the buyers, yet probably few buyers, especially where small quantities had been purchased at one sale, had used the caution suggested to them by the Act. And if the defendant's husband really bought the canvas at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice after such a length of time to punish her for his neglect. He, therefore, thought the evidence given by the defendant proper to be left to the jury, and directed them, that if upon the whole evidence they were of opinion that the defendant came to the possession of the linen without any fraud or misbehaviour on her part they should acquit her, and she was accordingly acquitted.

another result in this case; but they did not, and they chose to act upon the prisoner's statement, and to find a sort of special verdict, to which we must apply the law, and say that the jury, having negatived the fact of knowledge, the case comes within the decision of *Reg. v. Cohen*. We must therefore come to the conclusion, that on the finding of the jury the prisoner ought not to have been convicted.

POLLOCK, C.B.—I agree with my Lord Chief Justice that on this finding of the jury there ought to be no judgment against the prisoner. There is abundant evidence on which the jury might have found him guilty generally, and I own that I think the jury ought to have done so. But the jury say in answer to the question, whether the prisoner knew that the copper or any part of it was marked with the broad arrow, "We have not sufficient evidence before us to show that he knew it." I entirely agree that knowledge is to a certain extent essential to the crime. I must again call attention to the practice of courts leaving certain questions of fact to a jury in a criminal case, and then entering the verdict according to the finding of the facts. The word "guilty" must, in my judgment, be pronounced by the jury, and upon no set of facts sent up to us, except in the shape of a special verdict, ought this Court to act. In this case the finding of the jury makes it quite consistent with the prisoner's having an innocent possession of these stores.

MARTIN, B.—The question submitted to this Court is, whether the verdict was right. I think it was wrong in two particulars. First, I think the goods were not found in the prisoner's possession at all. In my judgment the 9 & 10 Will. 3, c. 41, s. 2, means that the goods must be found in the possession of the individual on his trial. If he has parted with the possession of them, and they are found, as in this case, in the custody of the captain of a vessel, I do not think he could be found guilty upon this enactment. I should have directed the jury to acquit him. On the other ground of knowledge of the mark I have no doubt. There are three decisions upon the point: the first in *Foster's Crown Law*, 449; then *Reg. v. Wilmott*, 3 Cox Crim. Cas. 281; and *Reg. v. Cohen*, all in favour of the view we adopt. I entirely concur in the judgment of Hill, J., in *Reg. v. Cohen*.

CROMPTON, J.—I am of the same opinion. I also think the point taken by my brother Martin that the goods must be found in the possession of the individual on his trial, a very serious one. Here there was plenty of evidence that the copper had once been in the possession of the prisoner, but still to constitute the offence they must be found while in his possession. It is not necessary to give any opinion whether the possession of a bailee, like a ship's captain, is the possession of the prisoner. That case is not before us; the other point of knowledge is the one that was really reserved for our opinion. It is sufficient for me to say that I share in the doubt of my brother Martin on the first point. On the other point I agree with the rest of the Court. The authorities

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are strong in support of our view, and I think it is right in principle. The findings are consistent with the prisoner's innocence. The only difficulty in the case arises on the second finding. The statute seems to suppose that a man should have the means of judging from the mark of the broad arrow being upon the stores, that he ought to make proper inquiries, and not take it without so doing. In this case there is nothing inconsistent with the prisoner's having been imposed upon by another party. This case falls within the principle of the case decided in the Court of Queen's Bench, *Hearn v. Garton*, 28 L. J. 216, M.C., where guilty knowledge was held to be necessary to constitute the offence of sending dangerous goods for carriage by railway.

WILLES, J.—I am of the same opinion. The jury have not found, either that the prisoner knew that these goods were Government stores, or that he wilfully shut his eyes to the fact. I own I regret the opinion that has been expressed on another part of the case, viz., whether these stores were found in the possession of the prisoner. The Court is not called upon to express any opinion on that point, and I am unable to concur, as at present advised, in that opinion. Possession means, not merely manual possession, but a property in the thing, though in the custody of another person. That definition applies to the construction of this statute, and I do not think that a thing has ceased to be in the possession of A. because he has taken his hands off it, and those of B. may happen to be upon it. However, I desire not to be understood as giving that as my final opinion upon the point. My judgment proceeds on the other point, and I agree with the rest of the court.

COCKBURN, C.J.—I certainly understood that the question whether the possession was sufficiently proved to be in the prisoner in this case was not part of the matter submitted or to be adjudicated upon by us. Lest I should be considered as sharing in the opinion of my brother Martin, I must say that I hold a diametrically opposite opinion upon it, and I do so because the point has been already expressly decided by this Court in the case of *Reg. v. Sunley*, 8 Cox Crim. Cas. 179, which was precisely similar to this in all its circumstances, and in which it was held by this Court that where the stores were in possession of a railway company to which they had been sent by the prisoner for the purpose of being conveyed to another place, the possession of the railway company was the possession of the prisoner, and that he was rightly convicted under this statute. The question is, therefore, concluded.

*Conviction quashed.*



## COURT OF QUEEN'S BENCH.

May 6, 1861.

(Before COCKBURN, C.J., CROMPTON, HILL, and  
BLACKBURN, JJ.)

GEORGE CURETON v. THE QUEEN.(a)

*Indictment—Game-laws—Allegation of previous convictions—*  
9 Geo. 4, c. 69, s. 1. (b)

*An indictment alleged that A., on, &c., at, &c., was duly convicted before three justices, for that he within six months, on, &c., by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise—that is to say, about the hour of five o'clock of the night, &c., did by night then and there unlawfully enter a certain close of land, situate, &c., with a gun, for the purpose of then and there taking and destroying game, contrary, &c., and that he was thereupon then and there adjudged, the same being a first offence, to be imprisoned, &c., for three calendar months, &c. That the said A. afterwards, on, &c., at, &c., was convicted before two justices, for that he within, &c., on, &c., in the night of the same day, &c., by night,*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The stat. 9 Geo. 4, c. 69, s. 1, enacts that "if any person shall, after the passing of this Act, by night unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall upon conviction thereof before two justices of the peace be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, himself in 10*l.* and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, himself in 20*l.* and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for the space of two years next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years."

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*unlawfully did enter on certain inclosed land, &c., with certain instruments for the purpose of killing, taking and destroying game thereon; this being his second offence, contrary, &c., and the said A. was then and there adjudged to be imprisoned, &c., for six calendar months, &c., and at the expiration of that period to enter into a recognizance not to offend so again for two years. That the said A. afterwards, and after he had been twice convicted as aforesaid, within, &c., on, &c., by night, to wit, about the hour of two o'clock in the night did unlawfully enter certain inclosed land, &c., for the purpose by night of therein taking and destroying game, &c.:*

*Held, that the first and second convictions were sufficiently shown to justify a conviction and prolonged sentence of imprisonment as for a third offence, under 9 Geo. 4, c. 69, s. 1, and that the other averments in the indictment were sufficient to sustain the conviction.*

**T**HIS was a writ of error brought by George Cureton, who was indicted at the Stafford January Quarter Sessions 1861, under the 9 Geo. 4, c. 69, s. 1, for a misdemeanor in going armed by night for the purpose of taking game, after two previous convictions for similar offences, tried, convicted, and sentenced to nine calendar months' hard labour.

The indictment stated that George Cureton, on the 26th December, 1854, at Wolverhampton, in the county of Stafford, was duly convicted before three of her Majesty's justices of the peace for the said county of Stafford, for that he the said George Cureton, within the space of six calendar months then last past, to wit, in the night of the 18th December, in the year aforesaid, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, that is to say, about the hour of five o'clock of the night of the day and year last aforesaid, did by night then and there unlawfully enter a certain close of land situate in the parish of Tettenhall, in the said county of Stafford, in the occupation of Lord Wrottesley, with a gun, for the purpose of then and there taking and destroying game, contrary to an Act passed in the ninth year of the reign of his Majesty King George the Fourth, entitled "An Act for the more effectual prevention of persons going armed by night, for the destruction of game." And the said George Cureton was thereupon then and there adjudged for his said offence—the same being his first offence—to be imprisoned in the House of Correction at Stafford, in and for the said county of Stafford, and there kept to hard labour for the period of three calendar months, and at the expiration of such period to find sureties by recognizance, himself in the sum of 10*l*., and two sureties in the sum of 5*l*. each, or one surety in the sum of 10*l*., conditioned that he the said George Cureton should not so offend again for the space of one year then next following, and in case he should not find such surety or sureties as aforesaid, that he should be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties should be sooner found.

That the said George Cureton afterwards, on the 27th November,

1858, at the parish of Shiffnal, in the county of Salop, was duly convicted before two of her Majesty's justices of the peace in and for the said county of Salop, for that he the said George Cureton, within six calendar months next before the making of the information on which the said conviction on the 27th November, 1858, was founded, to wit, on the 24th November in the year aforesaid, in the night of the same day, at the parish of Shiffnal, in the said county of Salop, by night unlawfully did enter and be in and upon certain inclosed land in the said parish of Shiffnal, in the occupation of William Henry Slaney, Esq.; with certain instruments for the purpose of killing, taking, and destroying game thereon, this being his second offence contrary to the form of the statute in such case made and provided, and the said George Cureton was thereupon then and there adjudged for his said offence to be imprisoned in the House of Correction at Shrewsbury, in the said county of Salop, and there kept to hard labour for the period of six calendar months; and at the expiration of such period to find sureties by recognizance, himself in the sum of 20*l.*, and two sureties in the sum of 10*l.* each, or one surety in the sum of 20*l.*, conditioned that he the said George Cureton should not so offend again for the space of two years then next following; and it was further adjudged that he the said George Cureton, in case he should not find such sureties as aforesaid, should be further imprisoned and kept to hard labour for the space of one year, unless such sureties should be sooner found.

That the said George Cureton afterwards, and after he had been so twice convicted as aforesaid, and within twelve calendar months now last past, to wit, on the 25th November, 1860, by night, to wit, about the hour of two o'clock in the night of the same day, did unlawfully enter and be in and upon certain inclosed land in the parish of Codsall, in the county of Stafford, in the occupation of William Fleming Fryer, for the purpose, by night as aforesaid, of therein taking and destroying game, and was then and there, by night, unlawfully in the said land with a certain gun and other instruments for the purpose, by night as aforesaid, of therein taking and destroying game, against the form of the statute, &c.

The said George Cureton having been tried, convicted, and adjudged to be imprisoned with hard labour as aforesaid, afterwards brought a writ of error.

*Assignment of errors.*—First, that the second conviction in the said indictment mentioned is bad and insufficient in law, and shows no jurisdiction in the justices to convict and adjudicate upon the said George Cureton, as therein mentioned; secondly, that the first conviction in the said indictment mentioned is bad and insufficient in law, for that it does not show with sufficient legal certainty that any offence had been committed; thirdly, that it does not appear by the said record and indictment that the said George Cureton had been twice duly convicted before two justices of the peace of so offending, as in the third count stated; lastly,

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that the matters in the said indictment are not sufficient in law to warrant the judgment against the said George Cureton, now given, or to convict him of the misdemeanor aforesaid, &c.

The following points for argument were delivered by the plaintiff in error:—

That the judgment is erroneous on account of each and all of the errors specially assigned, and in particular that it does not appear by the indictment that the plaintiff in error had been twice duly convicted before the justices of the peace of offending as the said plaintiff in error is in the said indictment charged with offending a third time;

That both or one of the two convictions of the said plaintiff in error, as mentioned and appearing in the said indictment, are or is bad and sufficient in law to support the said indictment for a third offence against the first section of the statute 9 Geo. 4, c. 69;

That the conviction dated the 26th December, 1854, is bad, because it does not on the face of it state with sufficient legal certainty that any offence has been committed by the plaintiff in error within the meaning of the statute 9 Geo. 4, c. 69;

That the conviction dated 27th November, 1858, is bad, for the following reasons: Because it does not on the face of it show with sufficient legal certainty that any offence had been committed by the plaintiff in error within the meaning of the statute 9 Geo. 4, c. 69, and because it does not show that the plaintiff in error had been previously convicted before two justices of any offence against the said statute, and because the adjudication in the said conviction of imprisonment for six calendar months with hard labour, and the further adjudication of imprisonment with hard labour for one year, unless two sureties should be sooner found by the plaintiff in error, was excessive, illegal, and without jurisdiction.

*Henry Matthews*, for the prisoner.—The second count in the indictment is bad. There must be shown two good and valid convictions for a first and second offence, and this record does not show any valid conviction for a second offence. On the second conviction no jurisdiction is shown to impose an imprisonment of six months, inasmuch as no valid first conviction is shown.

CROMPTON, J.—To have found him guilty a second time, they must have had evidence of a first conviction.

*Matthews*.—If the conviction were before the court on *certiorari* the Court would quash it as bad in form; it would have satisfied the terms of that conviction that the former offence was an assault.

HILL, J.—The conviction is set out according to its legal effect. Why should we assume it to be bad?

*Matthews*.—Because the Court will not assume anything against the prisoner.

COCKBURN, C.J.—If the second conviction were bad, but there was a good offence proved and jurisdiction, and it has not been brought up to be quashed, would not that make it good?

CROMPTON, J.—And might it not be amended under the 12 & 13 Vict. c. 45, s. 7?

*Matthews.*—The indictment must show a second valid conviction.

COCKBURN, C.J.—There are two convictions, neither appealed against. Are we to say that they have been unduly made? The prisoner not having chosen to appeal, is it incumbent upon us to say that either is invalid?

*Matthews.*—In trespass against magistrates the Court used to hold that a conviction, if bad, though unreversed would not protect the magistrate. The second conviction is bad for other reasons. It does not appear that it was for an offence under the Act; it says merely that he was on land with certain instruments.

BLACKBURN, J.—Surely, if the instrument had been named it would have been good. Any possible instrument for destroying game would do.

CROMPTON, J.—And if you lay one instrument you might prove another.

*Matthews.*—It is matter of law what instrument is within the statute.

BLACKBURN, J.—I should say it was matter of fact.

COCKBURN, C.J.—Are we to scan with the greatest technical nicety each word of this conviction?

*Matthews.*—Yes. In criminal cases the rule is as strict as it used to be on special demurrer. The first conviction is bad on the authority of *Davies v. The King*, 10 B. & C. 89. "Then and there" is not an averment of being then by night, or in the close, and "night" is not described in the words of the statute: (Paley on Convictions, 216; *Reg. v. Reynolds*, 13 L. J. 65, M.C.; *Rex v. Allen*, 5 Russ. & Ry. 513; *Fletcher v. Calthorpe*, 6 Q. B. 880, were referred to.)

*Alexander Stavelly Hill*, contra, was not called on.

COCKBURN, C.J.—I think our judgment should be for the defendant in error. The principal objection made is to the second conviction, and it is said that it does not appear on the face of the indictment that on the first occasion the prisoner was convicted, the answer to which seems to me to be, that although the conviction is not set out in *hæc verba*, all is shown that is necessary. The indictment sufficiently states a jurisdiction in the magistrates to punish for a second offence, and the requirements of the Act of Parliament sufficiently appear to have been satisfied. The other points have been disposed of in the course of the arguments. The statement that the prisoner did by night then and there enter is, I think, amply sufficient. There will, therefore, be judgment for the defendant in error.

CROMPTON, HILL, and BLACKBURN, JJ., concurred.

*Judgment for the defendant in error.*

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## COURT OF CRIMINAL APPEAL.

*April 27, 1861.*(Before POLLOCK, C.B., WILLIAMS, WILLES, BLACKBURN, J.J.,  
and WILDE, B.)

REG. v. DAVID DAVIES. (a)

*Assault—County Court bailiff in execution of duty—Warrant—  
Evidence of authority.**Upon an indictment for an assault upon a County Court bailiff in the execution of his duty, the production of a warrant of the County Court Judge for the apprehension of the prisoner, is a sufficient justification of the act of the bailiff in apprehending the prisoner, without proof of the previous proceedings authorising the warrant, even though the judgment be obtained in one county and the warrant sent for execution into a different county.**Williams, J. dubitante.*

CASE reserved by Byles, J.

At the last Assizes for the county of Carmarthen, David Davies was indicted for an assault on James Evans, acting in the execution of his office as sub-bailiff of the County Court of Lampeter.

The violence used by the defendant did not appear to exceed what was necessary to prevent his apprehension under the warrant annexed.

It was objected by the prisoner's counsel, citing 9 & 10 Vict. c. 95, ss. 99, 104 and 114, and 19 & 20 Vict. c. 108, ss. 48 and 104, that no neglect or refusal to pay appears on the face of the warrant; and that the previous proceedings authorising the warrant were not proved.

I reserved these objections, and any other objections apparent on the face of the warrant, for the consideration of the Court of Criminal Appeal.

The prisoner was convicted of a common assault subject to the foregoing objections, and was discharged on bail.

J. B. BYLES.

The documents annexed to the case were in the following form:—

“55, Warrant of Commitment.

“In the County Court of Carmarthenshire, holden at Llandovery.

“No. of plaint M. 145.

“No. of judgment-summons, No. 3.

“No. of warrant, No. 12.

“Between Rees Augustus, plaintiff, and David Davies, defendant.

“To the high bailiff and others, the bailiffs of the said court, and all peace officers within the jurisdiction of the said court, and to the governor or keeper of the gaol of Carmarthenshire, at Carmarthen.

“Whereas the plaintiff obtained a judgment against the defendant in the County Court of Carmarthenshire, holden at Llandovery, on the 14th June, 1859, for the payment of 4*l.* 13*s.* 6*d.* for debt and costs, upon which judgment and the subsequent process issued thereon, the sum of 5*l.* 3*s.* 3*d.* was at the date of the issuing of the summons hereinafter mentioned and still is due. And whereas a summons was at the instance of the plaintiff duly issued out of this court, by which the defendant was required to appear at this court on the 15th June, 1860, to answer such questions as might be put to him pursuant to sect. 98 of the statute 9 & 10 Vict. c. 95, in relation to such debt, which summons was proved to this Court to have been personally and duly served on the defendant. And whereas this Court, at the hearing of the said summons, ordered that the defendant should be committed to prison for twenty-five days for not having satisfied the said judgment and costs, having had sufficient means and ability so to do. These are therefore to require you the said high bailiff, bailiffs and others to take the defendant, and to deliver him to the governor of the county gaol at Carmarthen, and you the said governor to receive the defendant, and him safely keep in the said prison for twenty-five days from the arrest under this warrant, or until he shall be sooner discharged by due course of law.

“Dated 25th June, 1860.

“THOS. JONES, Registrar of the Court.

Amount of judgment or order	...	...	...	£4	13	6
Paid into court	...	...	...	0	0	0

Amount remaining due	...	...	...	4	13	6
Costs of warrant against the goods	...	...	...	0	7	6
Costs of judgment-summons and its hearing	...	...	...	0	12	3
Poundage for issuing this warrant	...	...	...	0	9	0

Total	...	...	...	£6	2	3
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“This warrant remains in force one year from the date thereof. This form to be applicable to all judgments recovered at the hearing, or by default or by consent, and to all orders within the jurisdiction of the court.”

[Indorsed.]

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N. 3.

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Penswen Llanyorwys,  
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"108. High Bailiff's Warrant to Registrar of Foreign Court.

"No. of plaint, M. 145.

N. 3.

"No. of warrant, N. 12.

"In the County Court of Carmarthenshire, holden at Llandovery.

"Between Rees Augustus, plaintiff, and David Davies, defendant.

"Whereas the warrant of commitment hereto annexed has been issued out of this court against the body of the above-named David Davies. And whereas the said David Davies resides out of the ordinary jurisdiction of this court, and is believed to be within the jurisdiction of the County Court of Cardiganshire, holden at Lampeter, of which you are the registrar. These are therefore to require you to cause the said warrant to be executed within the ordinary jurisdiction of the said last-mentioned County Court.

"Dated 25th June, 1860.

"RICHARD GARDNOR, High Bailiff of the County Court of Carmarthenshire, holden at Llandovery.

"To the Registrar of the County Court of Cardiganshire, holden at Lampeter.

*Giffard*, for the prisoner.—The first objection is now abandoned, as the warrant produced by the officer follows the form given in the schedule to the County Court Act, 19 & 20 Vict. c. 108. It is contended, however, that the previous proceedings authorising the issuing of the warrant should have been proved. This was what is termed a foreign judgment, that is, a judgment obtained in the Cardiganshire County Court sent for execution to Carmarthenshire, and it was incumbent to show the power to make such an order. Assuming that a good warrant to arrest would be a sufficient justification in an action of trespass against the officer acting under it (*Andrews v. Marris*, 1 Q. B. 1), yet he is liable for executing a warrant which is objectionable and void (*Carratt v. Morley*, 1 Q. B. 18); and it is further necessary to show that the warrant is authorised by law: (Ib.) More especially is it necessary to show the authority to issue the warrant where the personal liberty of the subject is involved. In *Rex v. Tooley*, 2 Lord Raym. 1296, where a person assisting a peace officer to apprehend a woman was slain by one of the prisoners, it was held by a majority of the judges that it was manslaughter only, if the woman was unlawfully imprisoned. This case is said, per Alderson, B., in *Warner's case*, 1 Moo. 385, to have been overruled. In *Warner's case* interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, was held not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. Foster, J., in his treatise on Crown Law, lays it down that *Tooley's case* has carried the law in favour of private persons officiously interposing in cases of illegal arrest further than sound reason and policy will warrant. But *Carratt v. Morley* is conclusive to this extent, that an arrest must be taken to be unlawful if the authority for issuing the warrant is not shown,



notwithstanding that an officer acting under it may be protected in a civil action on the ground that if he neglects to execute the writ he is liable to an action. Assuming the arrest to be unlawful, is there any authority for saying that a man may not resist the unlawful apprehension of his person?

BLACKBURN, J.—In *Mackalley's* case, 9 Co. 65, it was held to be murder to kill an officer acting under process, though erroneous.

*Giffard*.—That doctrine is inconsistent with the authorities.

WILLIAMS, J.—*Morrell v. Martin*, 4 Sc. N. R. 430, seems at variance with *Carratt v. Morley*. There, in an action of replevin, a plea of justification under the Highway Act, setting out a warrant of justices, was held bad for not showing that the justices had jurisdiction over the matter. The case was elaborately argued, and Tindal, C. J., says, at p. 316: "Upon these grounds it appears to us that, where there is a limited authority, and a limited authority only is given, if the party to whom such authority is given extends the exercise of his jurisdiction to objects not within it, his warrant will be no protection to the officer who acts under it; and that by necessary consequence, where the officer justifies under a warrant so granted by a court of limited jurisdiction, he must show that the warrant was granted in a case which fell within such limited jurisdiction."

*Giffard*.—In this case there was nothing to show jurisdiction to issue the warrant at all. In Hawk. P. C. bk. 1, c. 31, s. 61, it is said: "It seems to be agreed that whoever kills a sheriff or any of his officers in the lawful execution of a civil process, as on arresting a person on a *capias*, &c., is guilty of murder. Neither is it any excuse to such a person that the process was erroneous, for it is not void by being so, &c. Yet the killing of an officer in some cases will be manslaughter only, as when the warrant gives no authority to arrest the party, or where a good warrant is executed in an unlawful manner," &c. No doubt, where the process is erroneous only, it must be set aside before an action can be brought; but there is no case which shows that an arrest under circumstances like the present is lawful.

BLACKBURN, J.—In Foster's Crown Law, p. 311, cap. 8, ss. 7, 8, it is said: "And in the case of arrests upon process, whether by writ or warrant, if the officer named in the process give notice of his authority, and resistance be made and the officer killed, it will be murder; if in fact such notification was true, and the process legal, for after such notification the parties opposing the arrest acted on their own peril." Foster, J., goes on to say that he would not be understood to mean more than provided the process, be it by writ or warrant, be not defective in the frame of it and issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case. There may have been irregularity previous to the issuing; but if the sheriff or other minister of justice be killed in the execution of it, it will be murder, for the officer to whom it is directed must at his peril pay obedience to it. And

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therefore if a *ca. sa. fi. fa.* writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient upon an indictment for this murder to produce the writ and warrant without showing the judgment or decree: (*Rogers's case.*)”

No counsel appeared for the prosecution.

*Cur. adv. vult.*

June 1.—POLLOCK, C.B.—We are of opinion that the conviction ought to be affirmed. The process of the County Court was as much a justification to the officer by virtue of the County Court Act as a writ of execution out of a Superior Court to the sheriff; and it is clear that the production of such a writ would be sufficient in a proceeding of this description for assaulting the sheriff or his bailiff, without proof of the judgment: (*Foster's Crown Law*, 311.) My Brother Williams entertains some doubt, upon the ground that the statute seems to be in terms confined to civil cases; but, upon consideration, we think that the true construction of it is that above stated.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

June 1, 1861.

(Before COCKBURN, C.J., POLLOCK, C.B., CROMPTON and  
WILLES, JJ., and WILDE, B.)

REG. v. JOSHUA HASSALL. (a)

*Fraudulent bailee—Treasurer of a money-club—Larceny—  
20 & 21 Vict. c. 54, s. 4.*

*A treasurer of a money-club received small weekly payments from each member, and had authority, with the secretary's consent, to lend the club money to members. There was a periodical division of the funds and profits among the members:*

*Held, that the treasurer could not be indicted as a fraudulent bailee under the 4th section of 20 & 21 Vict. c. 54, for larceny of moneys paid in by a member.*

CASE reserved for the opinion of this Court.

The prisoner was tried before me at the intermediate Sessions for the West Riding of Yorkshire, held at Sheffield on the 1st March, 1861, upon an indictment under sect. 4 of the 20 & 21 Vict. c. 54 (the Bailee Act), which charged him with stealing the sum of 2*l.* 14*s.* 1*d.*, the property of John Farrell.

A second count charged the offence as a simple larceny.

It was proved that the prisoner and a man named Richard Shaw agreed early in January 1860, to start a money-club. They succeeded in getting together a number of members, of whom Farrell, the prosecutor, was one; and the club, which was not an enrolled friendly society, continued through the year 1860 to hold weekly meetings at a public-house in Sheffield, called the Travellers' Rest.

Shaw was secretary, the prisoner was treasurer, and they, together with one Bellhouse, formed the committee of management.

The rules of the club were as follow :—" Each member had to deposit weekly a sum of not less than threepence halfpenny, nor

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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more than thirteence halfpenny. Members omitting any weekly payments to be subject to a small fine. The odd halfpence to be expended—1st, on a feast at the end of the year; and, 2ndly, in payment of the services of Shaw, the prisoner, and Bellhouse.”

The prisoner alone had the custody of all moneys paid in by members, and the prisoner had authority to lend out of the club money in his hands, provided he first obtained the secretary's written consent to the loan, sums not exceeding 1*l*., at the rate of 5 per cent. interest, and several sums were thus lent out to members within the year, and repaid with interest. The rule of the club was, that such loans could only be made to members.

On the evening of the 24th April, 1860, the club money, which amounted to 39*l*. 13*s*. 1*d*., was to have been distributed amongst the members in this way—Each member was to receive back the exact amount he had paid in, less the odd halfpence and the amount of his fines, if any. He was also to receive, in addition, to the sum he had deposited, an equal share of the total amount arising from fines and from interest on loans.

The sum of 2*l*. 14*s*. 1*d*. laid in the indictment was the exact amount paid by John Farrell, the prosecutor, into the prisoner's hands, no part of it being made up of interest or fines. On the morning of the 24th December, the day when the distribution of the club money was to have taken place, the prisoner told Shaw that his house had been broken and robbed of the money belonging to the club, and of some of his own. The prisoner attended the club the same evening, and said that, if time was given him, he could pay 20*s*. in the pound.

The result of an examination of the prisoner's house was, that he was given into custody on a charge of stealing the club money.

On the above facts it was contended by the prisoner's counsel, first, that the prisoner was not a bailee of the sum of 2*l*. 14*s*. 1*d*., within the meaning of the 20 & 21 Vict. c. 54, as this money had been paid into his hands by the prosecutor in small sums, in silver and copper coins, which particular coins he was not bound to return; secondly, that the prisoner was, together with the other members of the committee, trustee of the funds of the club, and could not be indicted under sect. 4; thirdly, that the fact showed a partnership existing between the prosecutor and the prisoner, who could not therefore be convicted.

I overruled the objections, and left the case to the jury, who found the prisoner guilty, whereupon he was sentenced to twelve months' imprisonment with hard labour, until the opinion of the Court for the Consideration of Crown Cases Reserved could be taken, whether on the above facts the prisoner was rightly convicted.

WILSON OVEREND, Chairman.

*Campbell Foster*, for the prisoner.—It is submitted that the prisoner was not a bailee of the money mentioned in the indict-

ment within the meaning of the 20 & 21 Vict. c. 54, s. 4, which enacts that "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny." The word "bailee" in that section must be construed according to its known legal sense; and so construing it, the prisoner was not a depository of the money, which seems to come nearest to the facts of this case of any of the kinds of bailment pointed out in *Coggs v. Bernard*, 1 Sm. L. C. 82. The prisoner was not bound to return the particular coins deposited by the members of the club, but his duties were rather like those of a banker than of any other person. A banker is not a bailee of the moneys deposited by customers, but is a debtor to his customers in respect of their deposits: (*Pott v. Clegg*, 16 M. & W. 321.) And in *Tassell v. Cooper* (9 C. B. 526), Cresswell, J., says, "It is now settled that money paid in by a customer to a banker is money lent to the latter: (*Pott v. Clegg*.)"

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CROMPTON, J.—If anything, the prisoner was a trustee of these moneys under sect. 1 of the statute. Besides these very moneys may have been lent out to members.

Foster.—The interpretation clause, sect. 17, shows that the word "trustee" means a trustee on some express trust created by deed, will, or written instrument. This is not like *Rex v. Howell* (7 C. & P. 325), where the owner of a boat was employed to carry wooden staves from a vessel to the shore in his boat, and it was held to be a bailment.

WILLES, J.—Unless a man is entrusted with a specific thing to be returned, how can he steal it? In this case the prisoner has not stolen the money, he has stolen the debt.

WILDE, B.—If the argument is correct that the prisoner was a bailee, he would be equally criminal whether he was ready to pay with other money or not.

Foster.—In *Reg. v. Hoare* (1 Fos. & Fin. 647), it was held, that a person employed to collect debts for another did not thereby become a bailee of the money, not being bound to hand over the particular sum which he had received. *Reg. v. Garrett* (2 Fos. & Fin. 14), is also an authority to the same effect.

L. Hannay, for the prosecution.—It is admitted that the prisoner was not a trustee within the meaning of the statute, and that, unless he can be regarded as a bailee under the 4th section, the conviction cannot be sustained. In embezzlement, a man may be convicted of stealing something not specific.

WILLES, J.—I have heard Lord Wensleydale say more than once, that a servant was bound to hand over to his master the particular money he received on his account.

Hannay.—That cannot be true in all instances, as where a man is travelling for different houses. There was a bailment of this money to the prisoner within the 5th head, *locatio operis faciendi*. There was something to be done with respect to it, viz., the

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prisoner was to lend it out, &c., and he was to receive a salary for his duties. It is not necessary, in all cases, that the specific thing should be returned. In some cases the thing may be altered by additions, or the reverse, or its nature may be changed, as in the case of cloth converted into a coat. Practically one sovereign is the same thing as another. The word "property" in the statute is to include any real or personal property into which the property which may have been the original subject of a trust may have been converted or exchanged, and the proceeds thereof, and anything acquired by such proceeds.

COCKBURN, C. J.—We are all agreed that it is abundantly clear that this conviction cannot be sustained. The indictment is framed upon the 4th section of the 20 & 21 Vict. c. 54, which applies to bailees; and it is only necessary to say that the word bailment must be interpreted according to its ordinary legal acceptance. Understood in that sense, a bailment relates to something in the hands of the bailee which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under an obligation to return it in precisely the identical coins which he originally received. The present case, therefore, is not within the statute.

The rest of the Court concurring,

*Conviction quashed.*

## CENTRAL CRIMINAL COURT.

*April 8, 1861.*

(Before the RECORDER OF LONDON.)

REG. v. HUNT. (a)

*False pretences—Larceny as bailee—Evidence—Fraud.*

*Indictment charged the prisoner with obtaining 26l. 5s., the moneys of John Hackblock, by false pretences. According to the prosecutor's evidence he was induced to part with the money on the prisoner's statement that he was to pay 135l. for a pair of carriage horses. No such averment was contained in the indictment. It was then urged that the prisoner might be convicted of larceny as a bailee; but the money having been obtained by fraud, and the prosecutor having parted with all control over it as well as with the possession: Held, there was no bailment, and that prisoner could not be convicted.*

**V**ERE DAWSON HUNT was indicted for unlawfully obtaining 26l. 5s., the moneys of John Hackblock, by false pretences.

*Metcalfe (Poland with him), for the prosecution.*

*Ballantine, Serjt. (Ribton with him), for the prisoner.*

John Hackblock said: in consequence of a letter from a friend of mine I made an appointment to see some horses the prisoner had to sell. I afterwards got an order to see the horses; I went on the 28th of January to Knightsbridge, to the Swan Yard. I was shown a pair of carriage horses; I thought they would suit me and I went to 22, Parliament-street to see the prisoner. He was not there; his clerk gave me his address at Warrington Stables, Edgeware-road. I went there and saw the prisoner. I told him I had been to see a pair of horses at Knightsbridge, and that they were likely to suit me, and asked him if he could not get them for something less than 135l. He said, not a shilling, he had done his utmost and he could not get them for anything less. He also said "By Heavens! if they were my horses I would not take 180l. for them." He continued to praise them and went on to say that "He never bought or sold horses on his own account,

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

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that he was entirely in the commission way, and that he had disposed of horses to the value of 6,000*l.* within the last month." I then said if he could not get them under 135*l.* I would give that sum provided they would pass Mr. Field's (veterinary surgeon) examination satisfactorily. Mr. Field's certificate was satisfactory, and I paid him the money. I gave him 142*l.* and he gave me this receipt:

"Received from John Hackblock, Esq., 34, York-place, the sum of 135*l.* and 6*l.* 15*s.* commission on a pair of carriage horses passed by Mr. Field, V. S. V. D. Hunt."

I gave 5*s.* for the groom. Subsequently I returned the horses, one of them not being quiet in harness. On the 11th of February I received a letter purporting to come from Hunt. Next morning I went to the stables at Knightsbridge.

Proof was here given of the sale of the horses to the prisoner Hunt, for 110*l.*, by William Smart, book-keeper, and David Smith, proprietor, of the Swan-yard stables, at Knightsbridge.

Mr. Hackblock was then re-examined, and said he was not aware that 110*l.* only was to be paid to Mr. Smith for the horses. That the prisoner said he was to pay 135*l.* for them, and that statement induced him to part with the money. He paid the 6*l.* 15*s.* commission money because the prisoner said it was only a commission transaction, and that he never bought or sold on his own account.

Upon the close of the case for the prosecution,

The RECORDER said: I am of opinion that the evidence does not support the indictment. According to the prosecutor's evidence, he was induced to part with his money upon the prisoner's statement that he was to pay 135*l.* for the horses, and no such averment is contained in the indictment.

*Metcalf* then submitted, that if the Court were of opinion the false pretences charged in the indictment were not strictly made out, the prisoner might be convicted of larceny. The 7 & 8 Geo. 4, c. 29, s. 53, enacting "That if upon the trial of any person indicted for such misdemeanor (false pretence) it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled," &c. The prisoner obtained the money from the prosecutor for the purpose of handing it over to Mr. Smith, the owner of the horses. The prosecutor gives it to him for that purpose, and he is a bailee of the money.

The RECORDER.—I do not well see how there can be a bailment where there is fraud.

*Metcalf*.—If a person induces another by a false statement to entrust him with property to be given to a third person, is he the less a bailee because he is guilty of fraud? He cannot take advantage of his own fraud.

*Ballantine*, Serjt.—To constitute a bailment there must be a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or



purpose of the trust. For whom is the prisoner bailee here? Certainly not for the purchaser, for upon the case for the prosecution the prosecutor handed over the 25*l*., believing it is to be at once paid away. He parts with it never to be returned to him, or ever to be again subject to his direction. It cannot be contended the prisoner was bailee for the vendor.

The RECORDER.—No; upon the whole I not think this can be a bailment. It clearly is not a case to which the 4th section of the 20 & 21 Vict. c. 54, was intended to be applied. I think in point of law the case for the prosecution is not made out.

*Not Guilty.*

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## COURT OF QUEEN'S BENCH.

*February 12, 1861.*

(Before CROMPTON, HILL, and BLACKBURN, JJ.)

REG. v. LEATHAM. (a)

*Evidence—Clue to document—Privilege of protection—Corrupt Practices Act—Appeal.**If a confession of a crime be so obtained as to be inadmissible in evidence, yet if in the course of such confession a clue is given to other evidence which will prove the case, such latter evidence is admissible.**On an inquiry before Commissioners under the 15 & 16 Vict. c. 57, to examine as to corrupt practices at an election for a member of Parliament, a letter was produced, written by A., the party suspected of bribery, to his agent, in answer to one from the agent, asking for an account of sums advanced; this letter was produced by the agent. On an information being subsequently filed against A., this letter was called for and produced by the secretary to the Commissioners, in whose hands it had remained, and on the letter of the agent to which it was an answer being called for, and not being produced, secondary evidence of it was tendered and admitted:**Held, that such evidence was properly admitted, and that the provision in 15 & 16 Vict. c. 57, s. 8, "that no statement made by any person in answer to any question put by a commissioner, shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal, was not applicable, and did not prevent the admission of such evidence."**There is no appeal from the decision of this Court on a rule for a new trial of an information at the suit of the Attorney-General.*

**T**HIS was an information at the suit of the Attorney-General against the defendant, for certain offences against the Corrupt Practices Act, alleged to have been committed at the Wakefield election. It was tried before Martin, B., at York, when a verdict was returned for the Crown. (b)

Subsequently a rule *nisi* was obtained to set aside that verdict,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The indictment and other matters are set out in *Reg v. Leatham*, ante, p. 425.

and for a new trial, on the ground that there was no evidence of a payment made to a person named Gilbert in support of the first count of the information, and that the contents of a certain letter, written to the defendant by a person named Wainwright, an agent of the defendant, and the defendant's letter in answer to Wainwright, had been improperly admitted in evidence.

The Crown having determined to enter a *nolle prosequi* on the first count, the question as to the admission of the letters in evidence alone remained.

The two letters in question were dated respectively the 4th and 5th of April, 1859. The first was written by Wainwright to the defendant, asking for an account of sums advanced by him for election purposes, and was put in evidence in order to explain what the defendant's letter of the 5th August was an answer to. This last-named letter was in the following terms:—

“Hemsworth-hall, Pontefract, Aug. 5, 1859.

“Dear Sir,—In reply to your inquiry I beg to hand on the other side the sums of money which were advanced by myself and friends for election purposes, &c.

(Signed) “W. HENRY LEATHAM.”

And then followed a list of sums amounting in all to about 4,461*l.* 18*s.* 8*d.*

The defendant had been summoned to attend before the Commissioners appointed to inquire into the corrupt practices at the Wakefield election in May, 1859, and questions were then put to him, which he answered. He was also summoned to produce papers, &c., in his possession. His examination took place in October, and in November following Mr. Wainwright, who was also summoned and examined as a witness, sent in the defendant's letter of the 5th August to Mr. Dew, the secretary of the Commissioners, in pursuance of a promise made during his examination, who produced it on the trial of this information, and it was then found to be in defendant's handwriting. The other letter of the 4th August defendant had notice to produce, but not having done so, secondary evidence of it was received in the usual manner.

The *Solicitor-General* (*Overend, Monk, and Cleasby* with him) showed cause against the rule. The letters objected to were clearly admissible. The defendant's letter of the 5th of August, 1859, to Wainwright, was *prima facie* admissible, and the fact that it was produced before the commissioners did not exclude it from being produced on the trial of this indictment. It was not “a statement” within the meaning of the proviso of sect. 8. If it was a statement in writing it was not first made before the commissioners, but was made previously, and existed independently of any thing that occurred on the inquiry. As to Wainwright's letter, to which the defendant's was an answer, the admission of that was not objected to, and was merely produced to show to what the defendant's letter was an answer.

Sir *F. Kelly, Edward James, Price, and Quain* were called on to support the rule.—The 15 & 16 Vict. c. 57, intro-

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duced a principle and practice unknown before. The 6th section provides for inquiry into the existence of corrupt practices at elections; and such Commissioners are to report to her Majesty, and their reports are by the 7th section to be laid before Parliament. The 8th section enacts that it shall be lawful for such commissioners by summons under their hand and seal, or under the hand and seal of any one of them, to require the attendance before them of any persons whomsoever, whose evidence in the judgment of such commissioner or commissioners may be material to the subject-matter of the inquiry to be made by such commissioners, and to require all persons to bring before them such books, papers, deeds and writings as to such commissioners or commissioner appear necessary for arriving at the truth of the things to be inquired into by them under the Act. It then enacts that all such persons shall attend such commissioners, and shall answer all questions put to them by such commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds and writings required of them and in their custody, or under their control, according to the tenor of the summons. It then provides "that no statement made by any person in answer to any question put by such commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." The 9th section enacts, for the more effectually prosecuting any inquiry under the Act, that every person who has been engaged in any corrupt practice at or connected with any election of a member of Parliament, and is examined as a witness and gives evidence touching such corrupt practice before the commissioners, and who upon such examination makes a true discovery to the best of his knowledge touching all things to which he is so examined, shall be freed from all penal actions, forfeitures, punishments, disabilities and incapacities, and all criminal prosecutions to which he might have been or might become liable or subject at the suit of her Majesty for anything done by such person or persons in respect of such corrupt practice; and that no person shall be excused from answering any question put to him by such commissioners on the ground of any privilege, or on the ground that the answer to such question would tend to criminate such person. The 10th section enacts that when any witness is so examined as aforesaid, he shall not be indemnified under the Act unless he receive from the commissioners a certificate in writing under their hands, stating that he has upon his examination made a true disclosure touching all things on which he was so examined; and that if any action, information, or indictment shall be at any time pending in any court against any person so examined as a witness for any corrupt practice at any election to which the inquiry made by such commissioners has reference, such court shall, on the production and proof of such certificate, stay the proceedings in any such action, information, or indictment, and may in its discretion award to such person such costs as he may have been put to by such action, information,

or indictment. The 11th section gives the power to the commissioners to examine witnesses on oath; and the 12th section contains provisos for compelling the attendance of witnesses, and to compel them to answer questions and produce documents. The proviso in the 8th section, that no statement shall be admissible in any proceeding, it is now contended, applies to statements in writing as well as verbal statements, and any document produced under that Act is a "statement" which cannot be admitted in evidence.

BLACKBURN, J.—The document in question was written prior to the statement made to the commissioners, and was in existence prior to that statement. Is there anything in the Act which says that that which was evidence before shall cease to be evidence?

Sir Fitzroy Kelly.—The defendant's letter was not evidence before he was examined and made his statement; its existence was not known, and could not have been known but for this Act; its existence was found out by the examination of the defendant. If the Court should be of opinion that this rule should be discharged, I shall ask leave to appeal.

CROMPTON, J.—What in a criminal matter? The Common Law Procedure Act giving an appeal does not apply to criminal cases. It is clear there is no appeal.

HILL, J.—The way in which this question arises should be distinctly understood. The defendant's letter was not given, sent, or produced by Leatham to the commissioners—it was produced by Wainwright; then, as to the other letter, notice was given to Leatham to produce it, and he did not do so, and then secondary evidence of it was properly received.

Sir Fitzroy Kelly.—The privilege and the protection must be equally large; wherever, if the privilege had been claimed, the evidence would have been excluded, the protection extends. Whenever a man is compelled to answer and produce, he is protected; here the first clue to the letter proceeded from the defendant.

CROMPTON, J.—Suppose by threats and promises a confession of murder obtained, which would not be admissible, but you also obtain a clue to a place where a written confession may be found, or where the body of a person murdered is secreted; could not that latter evidence be made use of because the first clue to it came from the murderer? It matters not how you get it; if you steal it even, it would be admissible in evidence.

BLACKBURN, J.—I never heard a case of where a man served with a *subpoena duces tecum* claimed his privilege. I know it is so laid down in Taylor on "Evidence," but the cases do not bear it out.

Sir Fitzroy Kelly.—It is also so laid down in Starkie and Phillips.

BLACKBURN, J.—How often are documents taken out of a prisoner's pocket and produced against him; would you say he might claim his privilege?

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Sir *Fitzroy Kelly*.—There they are obtained by physical force; but suppose the man was in the witness box and said he had such a document in his pocket, but declined to produce it, as it would criminate him; he would be protected. The same rule applies to written and oral testimony in construing this statute.

CROMPTON, J.—I am of opinion that this rule ought to be discharged. The matter is important, but I have no doubt as to the meaning of this Act of Parliament. There is no means of sending the case to a higher court, but it is not a case of doubt and difficulty to make it necessary. It seems to me clear that the letters in question are not excluded, as being “a statement” made by the defendant in answer to a question by the commissioners within the meaning of the proviso in the 8th section of the Act. It is, indeed, unnecessary to say what the true construction of the proviso is, for the important letter is the one sent to the commissioner by Mr. Wainwright, and not by the defendant, and that was not a part of the defendant’s statement before the commissioners in any sense of the word. But the construction of the Act is clear, that documents referred to by a person making a statement under compulsory proceedings are not privileged, and that the person under examination is not to be protected from such documents being given in evidence when they are proved *aliunde*. I do not see why a document existing prior to the examination should, merely because it has been referred to in a person’s examination, be excluded from being afterwards given in evidence, and the person protected from having it brought against him. The intention of the Legislature was particularly directed to the power to send for persons, and to require them to produce papers and writings, and there is an express enactment that persons must answer questions and produce, when required, all writings, &c., and then there is a proviso clearly referring to the verbal statement, and not to any document that is produced and which may be proved *aliunde*:—“Provided, that no statement made by any person in answer to any question put by such commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding civil or criminal.” Now, in the first place, I cannot construe “any proceeding civil or criminal” merely to mean the proceedings under this Act. If necessary to decide that, I should think that the Legislature meant to give the witness as strong a protection from any statement he makes being given against him as possible, and that even if another charge were to arise out of that statement, the prosecution could not use the statement so made, against the person making it in any proceeding at all. Thus, if it became necessary to prove that the person had signed a deed or paper, that he was liable on a bill, or had forged a bill, I am of opinion, under this proviso, that he having given that evidence compulsorily, would be protected from having that evidence brought against him. That, I consider to be the rule. If in any civil or criminal proceeding a question

shall arise, which his evidence might tend to elucidate against him, I think thus far in favour of such a person, that he would be at liberty to say "this was compulsorily got from me," and I am protected from it; and it seems to me that the Legislature meant to give a full protection against statements so made, either verbal or written, if they should happen to be made in writing; but I do not at all see why we should suppose that the Legislature, when they could so easily have said no document shall be used against him, as to which any clue has arisen on examination before the commissioners, would not have said that. It would have been a most inconvenient thing if the Legislature had said so, because, as my brother Blackburn pointed out, you would have to inquire in every case, was this clue furnished by something the defendant said in his examination. He perhaps dropped some observation which led the commissioners to institute another inquiry; and by sending officers to this place or that place, something then comes out which is evidence against him; it would, in short, be the widest inquiry at Nisi Prius that could be conceived. I do not say that the mere difficulty would be conclusive against such a construction of the Act of Parliament, if the words admitted of much doubt, but I think we can hardly suppose that the Legislature would not have expressed themselves plainly to that effect, if they so intended to enact. The clear plain meaning of the use of the word "statement" is that it is to be a statement made for the first time before the commissioners, and I own I do not see why we should seek to distinguish such a case from what I consider to be analogous, viz., where a person makes a statement under compulsion or under promise, in which, in the opinion of some persons, the law has been carried very far, as to anything like bodily or mental torture, or getting persons to confess from fear or promise. This is a case where the Legislature has given some protection from what is obtained compulsorily from the parties. In the cases alluded to it is clear if the person is compelled by threat, or induced by promise to make a confession, that confession cannot be given in evidence against him, but anything that confession led to may be given in evidence. In the common case where goods are found in consequence of the statement of the party charged, or a murdered body found making the case very clear against him, those facts are given in evidence without question. Suppose, again, under a threat or compulsion a man states a letter will be found in his house, in which he has given an account of what he is charged with, surely that letter would be evidence. That appears to me to be exactly the same case as the present. Although the statement itself is not to be admitted in evidence, it is not intended to exclude the document itself, regarding which the statement is made. The exclusion of a document so referred to, would, to my mind, be very mischievous, and I do not see why we should be so tender in trying to exclude documents which, after all, are the proofs of guilt, nor why those should be excluded merely because from the evidence the man himself gives, he is rightly protected.

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I think the real answer to the point made is, that the Act of Parliament, after saying that a person shall come to be examined, and after saying a document shall be produced, then goes on to protect the party, and rightly I think, from the consequence of having any evidence used against him which has been contained in his statement, but does not either expressly, or, as I think, impliedly, or as I can even guess, exclude a document being given in evidence merely because it has been referred to in his examination. I may add, that my brother Wightman did not entertain any doubt about this matter, but as far as he heard the argument he thoroughly agreed in the conclusion to which we have arrived.

HILL, J.—I am of the same opinion. The rule before the Court asking for a new trial states two grounds, the improper admission in evidence of the letter of the 5th of August, and of the contents of the letter to which the letter of the 5th of August was an answer. Now the rule may be readily disposed of, if it were necessary to do so, on very narrow grounds indeed, without going into the question, which has been argued so fully on the construction of the Act of Parliament, for, in the first place, the letter of the 5th of August was not in any manner produced before the commissioners by the defendant, therefore it is utterly idle to say that any privilege of the defendant in any manner attaches to that letter. It was sent to the commissioners by Mr. Wainwright, who had been examined before them, who disclosed to them at the time the existence of that letter, and who sent it to the commissioners in obedience to their mandate to him. Therefore, so far as the letter of the 5th of August was concerned, really no question whatever arises on the Act of Parliament touching any privilege of the defendant against the production of it; and with regard to the contents of the letter to which the letter of the 5th of August is an answer, it would be sufficient to say that according to the judge's notes, which are full and ample, no objection whatever was taken to the question asked as to the contents of that letter, when it was spoken of by the witness, Mr. Wainwright. Notice to produce was admitted, and when the defendant's counsel refused to produce the letters, the question was asked and no objection taken, "What were the contents of the letter?" and the answer given by the witness as the substance of the letter was, "I wanted to know what was the amount he charged me with," and according to the statement made by the Solicitor-General to day in Court, the only object of putting in that letter, or proving the contents of it, was out of fairness to the defendant, that it might appear what the letter was, to which his letter of the 5th of August was an answer. But if it were necessary to give an opinion on the question as to whether, assuming in point of fact an objection were taken, and the objection were to this secondary evidence of that letter (of the 4th of August, I will call it, though the actual date does not appear), suppose an objection had been taken to the admissibility of the secondary evidence of that letter of the 4th of August, on the



ground that the letter itself had been communicated by the defendant to the commissioners, and sent to the commissioners in obedience to their command, would the secondary evidence of the letter be admissible? Assuming that the letter itself was not admissible, I should say that the secondary evidence of its contents would be, if that secondary evidence was independent of the first, because it is a well established rule of law that if a document cannot be proved in Court because of the privilege of one of the parties who holds it, or of the individual in whose custody it is, or of the public officer with whom the document lies, in any of those cases if the privilege be established against the production of the original document, independent secondary evidence of the contents of the document is admissible. But further, I do not think that the privilege exists as against the production of the document itself. The question turns on the construction of the proviso to the 8th section of the statute. Though I wish to express my opinion, and the reasons of it on this point, I do not feel it necessary to go very fully and at length into it, because my brother Crompton has gone so fully into the meaning of the statute, and I subscribe entirely to the reasons he has given. But this I will say, that I think it is a very false mode of argument to contend that the Legislature ought to have intended so and so, and because it ought to have intended so and so, therefore it did intend so and so, and therefore I will construe the plain words as if used according to the intention. The true mode of ascertaining the intention of the Legislature is this, look to the object of the Act of Parliament, and look to the language used for carrying out that object, and unless there is something directly repugnant to the object stated in the language used, the language used should be construed according to its plain grammatical meaning. Now let us look at the 8th section, the language used is: "That it shall be lawful for such commissioners, by summons under their hands and seals, or under the hand and seal of any one of them, to require the attendance before them at a place and time to be mentioned in the summons, which time shall be a reasonable time from the date of such summons, of any persons whomsoever whose evidence in the judgment of such commissioner or commissioners may be material to the subject-matter of the inquiry to be made by such commissioners, and to require all persons to bring before them such books, papers, deeds, and writings," &c. Then the following words are important: "All which persons shall attend such commissioners, and shall answer all questions put to them by such commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds, and writings required of them and in their custody or under their control, according to the tenor of the summons." Two things are required, the witnesses must in all cases attend, they must answer all questions put to them, and produce all books and documents required by the summons. There are two distinct duties, to answer the questions, and produce books

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and documents. Then what is the proviso: "Provided always that no statement made by any person in answer to any question put by such commissioner." That is with regard to the first part of the duty, nothing about documents or books, and "that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." Taking the plain literal construction of that proviso, it only applies to the examination of the witness, and the answers made by the witness to questions put to him; but we are asked to extend it to all documents, books, papers, and writings which he shall produce in answer to the summons calling upon him to produce documents. I think the Legislature intended nothing of the kind. I think the Legislature intended to leave that which had an independent prior existence, and which when proved would be a speaking fact against the party who wrote the particular document or made the entry on the books, to leave that as it was before, and merely to protect the witness as to any statement he might make in answer to the questions, and that we should be making and not construing an Act of Parliament, if we were to put the meaning contended for on the proviso contained at the end of the 8th section. As I have already said, I do not think it necessary to go into other sections; but for the reasons stated I think the rule should be discharged.

BLACKBURN, J.—I also think that the rule should be discharged. I will assume (which I rather think from the notes of the learned judge appears not to be the case) that this document was first mentioned before the commissioners by the defendant. The only question is the meaning of the Act of Parliament in such a case. It is perfectly plain that the Legislature, when instituting a commission before which all parties were to come, meant that the disclosure should be full and complete as to all matters connected with the corrupt practices into which the commissioners were inquiring, and for which purpose they provided that the witnesses summoned before the commissioners should answer all questions, and produce all documents, bearing upon that question. The Legislature then had a knowledge and were aware, that a witness who did thus answer might very well give evidence which would criminate him, and show that he was guilty of the corrupt practices as to which the inquiry was taking place, and might also make a statement that would be evidence against him as to other matters, and the Legislature having this before them, and seeing the inconveniences that might arise from it, provided by sections 9 and 10, that if the person who is summoned has been a party to any corrupt practice and makes a full disclosure, and a true discovery to the best of his knowledge touching all things, he shall obtain a certificate, and be absolutely indemnified against any corrupt practices in which he has taken part. If he, being called and examined,

equivocates, and does not make a true discovery, then the Legislature deprive him of that protection, and he still may be prosecuted for any corrupt practice in which he has taken part, although it may be that before the commissioners he may have made statements, and true statements, as to part. Then the Legislature have still a further consideration. They think if he does not make a true discovery that he may still be prosecuted for the corrupt practice, or even supposing he does make a true discovery, that still there may be an action or suit brought against him of a civil or criminal nature, in which the statement he made might be used as evidence against him; and, thinking it hard that such things should be given in evidence against him, they provide by the 8th section, that "no statement made by any person, in answer to any question put by such commissioners, shall, except in cases of indictment for perjury committed in such answer, be admissible in evidence in any proceeding, civil or criminal." The argument that has been used on behalf of the defendant in support of the rule seems to be this, that instead of saying, as the section does, that the statement merely which the party has made shall not be admissible in evidence in any case, civil or criminal (which by necessity means against him, for I can hardly imagine a case in which a statement made by a man would be evidence against anybody else), the proviso means that a fact or document shall not be proved by other evidence against a person, provided he has made a statement before the commissioners concerning it, or as Mr. Quain says, provided he has made a statement, and that statement has given the first clue to the discovery of the fact or document to which the statement refers, and which fact or document is evidence independently. I quite agree in what my Brother Hill has said, which I do not repeat, that it is our duty and our business to say what the intention of the Legislature is as expressed by words, and not to make an enactment for them, and it does seem to me, looking at the words that I have just read, a wonderful strain upon them, and a great addition to the words to put any meaning upon them to the effect contended for. But I own, if it were in my province to consider what the Legislature in their discretion would have been wise to say, I should have thought an enactment that where a man had made some statement which gave some clue to a fact against him, that this should protect him from the fact being proved *aliunde*, although he was a person who did not make a true discovery, for he could not be prosecuted if he made a full and true discovery, would have been very unwise. I think if the Legislature had meant to do that, that they would have been passing an enactment which would be rather tending to protect corrupt practices than to encourage the discovery of them, and it would also have made an inquiry at Nisi Prius excessively inconvenient. Such an enactment would have led to an inquiry into every species of evidence tendered as to whether the first clue was given before the commissioners. That would have been so extremely incon-

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—  
*Evidence—  
Privilege.*

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venient that the Legislature, I think, were wise and discreet in not making such a provision. At all events, I may say the provision is one so inconvenient, and so unlike any that I have ever heard of in other proceedings in the law, that it would require express and clear language to make me think that the Legislature had that intention. Here I can find no such words, and in fact we are asked to interpolate a great many words into the Act of Parliament, which, if I thought it was a judicious thing should be there, we have no power to introduce. For these reasons I think the rule should be discharged.

*Rule discharged.*

## Ireland.

## CLONMEL ASSIZES.

*March, 1861.*

(Before Mr. Justice O'BRIEN.)

REG. v. NICHOLAS CREAU.(a)

*Indictment for murder—Statement of counsel.*

*The evidence of a witness relative to a material conversation with a prisoner when in custody, ought not to be stated in the opening speech of the counsel for the prosecution; as the evidence may possibly be inadmissible when subsequently tendered arising from the circumstances under which the conversation took place.*

IN this case the prisoner was indicted under the 10 Geo. 4, c. 34, s. 9, for soliciting one Daniel Gleeson, at Cahir, in the county of Tipperary, in Ireland, wilfully, feloniously, &c., to kill and murder one Thomas Herbert, of Kilcutierna, in the county of Kerry.

*Armstrong*, Serjt., as counsel for the Crown, was proceeding to state, amongst other things, that the prisoner having been committed to the Cahir Bridewell an important declaration was there made by him to the wife of the keeper of the Bridewell.

*Johnstone*, on behalf of the prisoner, objected, submitting that this was not the proper time to make this statement, as a question might arise whether, under the circumstances, this conversation would be at all admissible; no information having been sworn by this woman, he, therefore, submitted that the minds of the jury ought not to be influenced by any statement of the subsequent proof of which there might be a doubt.

O'BRIEN, J., was of opinion that the conversation ought not to be mentioned at this stage of the proceedings. As, independently of the question, whether it would be admissible when the witness

(a) Reported by A. D. M'GURRY, Esq., Barrister-at-Law.

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was produced, he thought that where material information came to the knowledge of those instituting a prosecution, it ought, if to be used against a prisoner, to be reduced to writing and a copy furnished with the other informations.

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SAME CASE.

*Motive for the commission of an offence—Service of a notice to quit upon a servant.*

*Where the object of the Crown is to supply a motive for the commission of the offence, service of a notice to quit upon the servant of the prisoner is not sufficient to bring home knowledge to the prisoner so as to supply that motive.*

**F**OR the purpose of establishing a motive for the personal hostility of the prisoner to the Rev. W. Herbert, various proceedings in Chancery between them were given in evidence. And for the same purpose,

John Moore was re-examined, who swore that he knew the receiver (the son of the Rev. W. Herbert), who was appointed in the Chancery suit as receiver over the lands of Farnikeel, of which the prisoner was the tenant. That on the 28th of August, 1860, he (the witness) served a true copy of a notice to quit (now produced) by leaving the same with the maid servant at the prisoner's house.

*Armstrong*, Serjt., now proposed to give the copy of the notice to quit in evidence.

O'BRIEN, J., rejected the evidence. In a civil proceeding the original notice need not be called for in order to let in a copy, but it was not so clear that the same principle applied to a criminal case. However the ground upon which he rejected this document in evidence was that the evidence was tendered to supply a motive, and yet it never appeared that the notice ever came to the hands of the prisoner. In an ejectment in the superior courts or civil bill courts, service upon the servant in the house would be unquestionably valid, but here the Court ought not to speculate upon the probability of it having reached the prisoner's hand, in order that the jury might presume a hostile motive in the prisoner's mind.

## KILKENNY ASSIZES.

1861.

(Before Mr. Justice CHRISTIAN.)

REG. v. JOHN HASSETT. (a)

*Interrogation of prisoner when in custody.*

*It is not the duty of constables of police to interrogate prisoners in their custody, even though they have first cautioned them not to criminate themselves.*

**T**HE prisoner was indicted for stealing twenty-one sovereigns, the property of William Farrelly.

*Second count.*—For receiving same, knowing them to have been stolen.

*Wall, Q.C., and Curtis for the Crown.*

*Lover, for the prisoner.*

The money charged to have been stolen was kept with other sovereigns in the house of Farrelly in a desk. The prisoner was on a visit at Farrelly's. On the 23rd of February last he left the house, but in a few hours was brought back by constable Lowry, who had arrested him on suspicion. Farrelly then, in the presence of the constable and prisoner, searched his desk and missed twenty-one of the sovereigns. After stating the above facts, Farrelly was proceeding to state what passed at this time in conversation between him and the prisoner, when

*Lover, for the prisoner, objected to any part of the conversation being given in evidence until it was first shown by the constable in whose charge the prisoner was, that no promise, threat, or inducement had been held out to him.*

CHRISTIAN, J., having so ruled.

Constable *Lowry*, having been sworn, stated that having brought the prisoner before Mr. Butler, a magistrate, he cautioned him not to say anything that would criminate himself.

*Lover* again objected that this caution was not sufficient. The prisoner was only in safe custody; the constable was not the person to interrogate the prisoner: *R. v. Hughes* (1 C. & Dix,

(a) Reported by A. D. M'GURRY, Esq., Barrister-at-Law.

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HASSETT.

1861.

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Prisoner's  
statement.*

C.C. 15, per Doherty, C.J.) 'It was the duty of the justice, under the 14 & 15 Vict. c. 93, s. 14, to have taken the prisoner's statement down in writing, after a proper caution.

For the Crown it was contended that, a proper caution once given, any admission, confession, or other statement made at any time subsequent might be given in evidence.

CHRISTIAN, J., observed that there was a difference in the value of testimony voluntarily given and that elicited in answer to questions. He objected to the police questioning persons while in their custody on a criminal charge, and he thought the counsel for the Crown ought not to press this particular evidence.

*Evidence withdrawn.*



# APPENDIX.

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## STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF  
PARLIAMENT OF 1856.

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### JOINT STOCK COMPANIES ACT.

19 & 20 VICT. CAP. 47, SECT. 79.

*An Act for the Incorporation and Regulation of Joint Stock Companies  
and other Associations.*—[14th July, 1856.]

LXXIX. If any director, officer, or contributory of any company for the winding up of which an order or decree has been made under this act, destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company, with intent to defraud the creditors or contributories of such company, or any of them, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.

Penalty on falsification of books.

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### GRAND JURIES ACT.

19 & 20 VICT. CAP. 54.

*An Act to facilitate the Dispatch of Business before Grand Juries in  
England and Wales.*—[14th July, 1856.]

**W**HEREAS it would expedite and improve the administration of criminal justice if persons attending to give evidence before grand

VOI. VIII. a

19 & 20 Vict.  
c. 54.

*Grand Juries  
Act.*

Witnesses  
examined before  
grand juries to  
be sworn in the  
presence of the  
jurors.

Not necessary  
for witnesses to  
be sworn in  
open court.  
Interpretation  
of terms.

juries were sworn in the presence of the jurors who are to act upon such testimony: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the passing of this act it shall be lawful for the foreman of every grand jury empannelled in England and Wales, and he is hereby authorized and required, to administer an oath to all persons whomsoever who shall appear before such grand jury to give evidence in support of any bill of indictment, and all such persons attending before any grand jury to give evidence may be sworn and examined upon oath by such grand jury touching the matters in question; and every person taking any oath or affirmation in support of any bill of indictment who shall wilfully swear or affirm falsely shall be deemed guilty of perjury; and the name of every witness examined or intended to be so examined shall be endorsed on such bill of indictment; and the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment: provided, however, that nothing in this act contained shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall remain payable as if this act had not passed.

II. From and after the passing of this act it shall not be necessary for any person to take an oath in open court in order to qualify such person to give evidence before any grand jury.

III. The word "foreman" shall include any member of such grand jury who may for the time being act on behalf of such foreman in the examination of witnesses in support of any bill of indictment; and the word "oath" shall include affirmation, where by law such affirmation is required or allowed to be taken in lieu of an oath.

## CRIMINAL JUSTICE ACT.

19 & 20 VICT. CAP. 118.

*An Act to amend the Act of the last session of Parliament for diminishing Expense and Delay in the Administration of Criminal Justice in certain cases.*—[29th July, 1856.]

18 & 19 Vict.  
c. 126.]

**W**HEREAS it is expedient to amend the act of the last session of Parliament, chapter one hundred and twenty six, as hereinbefore mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Provision as to  
certain liberties

I. So much of section nine <sup>(1)</sup> of the said act as provides that every

<sup>(1)</sup> What is marked section nine by the Queen's Printers in 18 & 19 Vict. c. 126, is by mistake printed in the order of section ten of that act, and the section marked section nine does not provide for petty sessions being an open court as recited in this first section. The provision so referred to is, in fact, in a section marked section ten of that act.

petty sessions for the purposes of that act shall be the petty sessions holden for a petty sessional division shall not extend or be applicable to petty sessions holden in or for the liberties of the Cinque Ports or any part thereof, or to any other liberty or place not forming and not being within a petty sessional division; and all the duties which under the said act should be performed by the clerks of assize as clerks of the Crown shall in the counties palatine of Lancaster and Durham be performed by the clerks of the Crown of those counties palatine (who are not clerks of assize); and all fees and emoluments heretofore payable to them for the performance of their duties as clerks of the Crown shall be and they are hereby abolished; and all the powers given and provisions made by the twentieth section of the said act for the payment of clerks of assize by salary in lieu of fees, in respect of their duties as clerks of the Crown, shall be and the same are hereby extended and made applicable to the payment by salary in lieu of fees and emoluments of the clerks of the Crown in the counties palatine of Lancaster and Durham, as well as to the payment of the expenses of their respective offices.

19 & 20 Vict.  
c. 118.

*Criminal  
Justice Act.*

and places not  
in petty ses-  
sional divisions  
—Provision as  
to fees, &c.,  
payable to  
certain persons  
herein named.

## STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF  
PARLIAMENT OF 1857.

### FRAUDULENT TRUSTEES, &c., ACT.

20 & 21 VICT. CAP. 54.

*An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers and other Persons intrusted with Property.—[17th August, 1857.]*

**W**HEREAS it is expedient to make better provision for the punishment of frauds committed by trustees, bankers, and other persons intrusted with property: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Trustees  
fraudulently  
disposing  
of property  
guilty of a mis-  
demeanor.

Bankers, &c.,  
fraudulently  
selling, &c.  
property in-  
trusted to their  
care, guilty of  
misdemeanor.

Persons under  
powers of  
attorney fraudu-  
lently selling  
property guilty  
of misdemeanor.

Bailees fraudu-  
lently convert-  
ing property to  
their own use

I. If any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or purposes, or shall, with intent aforesaid, otherwise dispose of or destroy such property or any part thereof, he shall be guilty of a misdemeanor.

II. If any person being a banker, merchant, broker, attorney, or agent, and being intrusted for safe custody with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use such property or any part thereof, he shall be guilty of a misdemeanor.

III. If any person intrusted with any power of attorney for the sale or transfer of any property shall fraudulently sell or transfer or otherwise convert such property or any part thereof to his own use or benefit, he shall be guilty of a misdemeanor.

IV. If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny.

V. If any person, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply, for his own use, any of the money or other property of such body corporate or public company, he shall be guilty of a misdemeanor.

VI. If any person, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the money or other property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, he shall be guilty of a misdemeanor.

VII. If any director, manager, public officer, or member of any body corporate or public company shall, with intent to defraud, destroy, alter, mutilate, or falsify any of the books, papers, writings, or securities belonging to the body corporate or public company of which he is a director or manager, public officer or member, or make or concur in the making of any false entry, or any material omission in any book of account or other document, he shall be guilty of a misdemeanor.

VIII. If any director, manager, or public officer of any body corporate or public company shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to such body corporate or public company, or to enter into any security for the benefit thereof, he shall be guilty of a misdemeanor.

IX. If any person shall receive any chattel, money, or valuable security which shall have been so fraudulently disposed of as to render the party disposing thereof guilty of a misdemeanor under any of the provisions of this act, knowing the same to have been so fraudulently disposed of, he shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the party guilty of the principal misdemeanor shall or shall not have been previously convicted, or shall or shall not be amenable to justice.

X. Every person found guilty of a misdemeanor under this act shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to suffer such other punishment, by imprisonment for not more than two years with or without hard labour, or by fine, as the court shall award.

XI. Nothing in this act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court of law or equity, or in the courts of bankruptcy or insolvency; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any proceeding under this act.

XII. Nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under this act, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against this act might have had if this act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in this act contained shall affect or

20 & 21 Vict.  
c. 54.

*Fraudulent  
Trustees, &c.,  
Act.*

guilty of  
larceny.

Directors, &c.  
of any body  
corporate or  
public company  
fraudulently  
appropriating  
property.

Keeping fraudu-  
lent accounts.

Wilfully  
destroying  
books, &c.

Publishing  
fraudulent  
statements,  
guilty of  
misdemeanor.

Persons  
receiving prop-  
erty fraudu-  
lently disposed  
of, knowing the  
same to have  
been so, guilty  
of misdemeanor.

Punishment for  
a misdemeanor  
under this act.

No person  
exempt from  
answering  
questions in any  
court; evidence  
not admissible  
in prosecutions  
under this act.

No remedy at  
law or in equity  
shall be affected  
—Convictions  
shall not be  
received in  
evidence in  
civil suits.

20 & 21 Vict.  
c. 54.

*Fraudulent  
Trustees, &c.,  
Act.*

No prosecution  
shall be  
commenced  
without the  
sanction of  
some judge or  
the Attorney-  
General.

If offence  
amounts to  
larceny, person  
not to be  
acquitted of a  
misdemeanor.

Costs of  
prosecutions.

Misdemeanors  
not triable at  
sessions.

Interpretation  
of certain  
terms.

Act not to  
extend to  
Scotland.

prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property, misappropriated.

XIII. No proceeding or prosecution for any offence included in the first section, but not included in any other section of this act, shall be commenced without the sanction of her Majesty's Attorney-General, or, in case that office be vacant, of her Majesty's Solicitor-General: provided that where any civil proceeding shall have been taken against any person to whom the provisions of the said first section, but not of any other section of this act, may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this act without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending.

XIV. If upon the trial of any person under this act it shall appear that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of a misdemeanor under this act.

XV. In every prosecution for any misdemeanor against this act the court before which any such offence shall be prosecuted or tried may allow the expenses of the prosecution in all respects as in cases of felony.

XVI. No misdemeanor against this act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

XVII. The word "trustee" shall in this act mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall also include the heir and personal representative of any such trustee, and also all executors and administrators, liquidators under the Joint Stock Companies Act, 1856, and all assignees in bankruptcy and insolvency:

The word "property" shall include every description of real and personal property, goods, raw or other materials, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and such word property shall also denote and include not only such real and personal property as may have been the original subject of a trust, but also any real or personal property into which the same may have been converted or exchanged, and the proceeds thereof respectively, and anything acquired by such proceeds.

XVIII. This act shall not extend to Scotland.

## PROBATE AND LETTERS OF ADMINISTRATION ACT.

20 &amp; 21 VICT. CAP. 77, SECT. 28.

*An Act to amend the Law relating to Probates and Letters of Administration in England.*—[25th August, 1857.]

XXVIII. If any person forge the signature of any registrar, district registrar, or commissioner for taking oaths, or forge or counterfeit any seal of the Court of Probate, or knowingly use or concur in using any such forged or counterfeit signature or seal, or tender in evidence any document with a false or counterfeit signature of such registrar, district registrar, or commissioner, or with a false or counterfeit seal, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of his life or any term not less than seven years, or to imprisonment for any term not exceeding three years, with or without hard labour.

Penalty on forging or counterfeiting seals or signatures of officers.

## DIVORCE AND MATRIMONIAL CAUSES ACT.

20 &amp; 21 VICT. CAP. 85, SECT. 50.

*An Act to amend the Law relating to Divorce and Matrimonial Causes in England.*—[28th August, 1857.]

L. All persons wilfully deposing or affirming falsely in any proceeding before the court shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attached thereto.

Penalties for false evidence.

## STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF  
PARLIAMENT OF 1858.

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## FALSE PRETENCES ACT.

21 & 22 VICT. CAP. 47.

*An Act to amend the Law of False Pretences*—[23rd July, 1858.]

**W**HEREAS it is expedient to amend the law relating to false pretences : be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Any person  
obtaining  
signature to bill  
of exchange,  
&c. by false  
pretences  
deemed guilty of  
misdemeanor.

I. If any person shall by any false pretence obtain the signature of any other person to any bill of exchange, promissory note, or any valuable security, with intent to cheat or defraud, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be sentenced to penal servitude for the term of four years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award.

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## JOINT STOCK COMPANIES ACTS AMENDMENT ACT.

21 & 22 VICT. CAP. 60, SECTS. 6, 7, 20, 21.

*An Act to amend the Joint Stock Companies Acts, 1856 and 1857, and the Joint Stock Banking Companies Act, 1857.*—[23rd July, 1858.]

Actions and  
suits to be  
stayed.

VI. Where an order has been made for winding-up a company compulsorily, or where an order has been made, in pursuance of the said



nineteenth section, for the continuance of a voluntary winding-up, no suit, action, or other legal proceeding shall be proceeded with or commenced against the company or the public officer thereof, or any member of the company in respect of a debt of the company, except with the leave of the court, and subject to such terms as the court may impose.

VII. Where an order has been made for winding-up a company compulsorily, or where an order has been made, in pursuance of the said nineteenth section, for the continuance of a voluntary winding-up, the court may make such order as it thinks just as to the inspection by the creditors and contributories of books and papers of the company, and such books and papers may be inspected by creditors or contributories in conformity with such order of the court, but not further or otherwise.

XX. Where any order is made for winding up a company compulsorily, or for the continuance of a voluntary winding-up, subject to the provisions of the said nineteenth section, if it appear in the course of such winding-up that any past or existing director, manager, public officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in such winding-up, or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and to order the costs and expenses to be paid out of the assets of the company.

XXI. Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding-up that any past or existing director, manager, public officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.

21 & 22 Vict.  
c. 60.

*Joint Stock  
Companies  
Acts  
Amendment  
Act.*

Inspection of  
books.

Prosecution of  
delinquent  
directors, in  
the case of  
voluntary  
winding-up.

Prosecution of  
delinquent  
directors, &c.  
in case of  
compulsory  
winding-up.

## STIPENDIARY MAGISTRATES ACT.

21 & 22 VICT. CAP. 73.

*An Act to amend the Law concerning the Powers of Stipendiary Magistrates and Justices of the Peace in certain Cases.*—[2nd August, 1858.]

**B**E it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and

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b

21 & 22 Vict. Commons, in this present Parliament assembled, and by the authority of  
c. 73. the same, as follows :

*Stipendiary  
Magistrates  
Act.*

A stipendiary  
magistrate may  
do alone all acts  
authorized to be  
done by two  
justices.

Foregoing  
enactment to  
extend to acts  
required to be  
done at petty  
sessions.

Saving of juris-  
diction of  
quarter  
sessions and  
special sessions  
and as to  
licences.

Saving as to  
metropolitan  
police  
magistrates.

As to extent of  
section 22 of  
11 & 12 Vict.  
c. 43.

Section 18 of  
2 & 3 Vict.  
c. 71, amended.

Magistrates  
acting for  
places in the  
metropolitan

I. Every stipendiary magistrate appointed for any city, town, liberty, borough, place, or district, sitting at a police court or other place appointed in that behalf, shall have power to do alone any act and to exercise alone any jurisdiction which under any law now in force, or under any law not containing an express enactment to the contrary hereafter to be made, may be done or exercised by two justices of the peace, and all the provisions of any act of Parliament auxiliary to the jurisdiction of such justices shall be applicable also to the jurisdiction of such stipendiary magistrate.

II. The authority and jurisdiction given to a stipendiary magistrate by the enactment hereinbefore contained shall extend and apply as well to the cases where the act or jurisdiction is or hereafter may be expressly required to be done or exercised by justices sitting or acting in petty sessions as to other cases, and any enactment authorizing or requiring persons to be summoned or to appear at such petty session, shall in the like cases authorize or require persons to be summoned or to appear before the stipendiary magistrate having jurisdiction at the police court or other place appointed for his sitting.

III. Nothing hereinbefore contained shall extend to acts to be done or jurisdiction to be exercised at the general or quarter sessions of the peace, or to acts or jurisdiction expressly required (by any existing or future law) to be done or exercised at special sessions, or to any act or jurisdiction in relation to the grant or transfer of any licence.

IV. Nothing hereinbefore contained shall extend, alter, or affect in any manner the powers or authorities of the magistrates appointed or to be appointed to the police courts in the metropolitan police district.

V. Section twenty-two of the act of the session holden in the eleventh and twelfth years of her Majesty, chapter forty-three, shall extend and be deemed to have extended to all cases in which it is returned to a warrant of distress issued under the authority of such act for levying any penalty, compensation, or sum of money, adjudged or ordered to be paid by any conviction or order that no sufficient goods of the party against whom such warrant was issued can be found, where the statute on which the conviction or order is founded provides no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing payment of the same, as well as to cases where the statute on which the conviction or order is founded authorizes the issuing thereon of a warrant of distress.

VI. So much of section eighteen of the act of the session holden in the second and third years of her Majesty, chapter seventy-one, as makes void (except in the cases therein excepted) "every summons or warrant issued by any justice of the peace of the counties of Middlesex, Surrey, Kent, Essex, or Hertfordshire respectively, requiring any person residing within the metropolitan police district to appear at any place without the said district to answer any information or complaint touching any matter arising within the said district," shall not apply to any such summons or warrant in respect of any matter arising within any part of the said district not assigned for the time being to any of the police courts of the metropolis.

VII. In every case in which any person shall be brought before any police magistrate, or any two magistrates acting within the said metropolitan police district, for any place within which no police court shall

have been established, for any offence under the twenty-fourth section of 21 & 22 Vict c. 73. an act of the session holden in the second and third years of her Majesty, chapter seventy-one, such police magistrate, or such magistrates acting in and for such place, may hear and determine the matter, and in case of conviction may commit the offender to be imprisoned in any gaol or house of correction in and for the county, liberty, or place in which such offence shall have been committed, though not within the said metropolitan police district, and with or without hard labour for any time not exceeding two calendar months, and in their discretion, without the infliction of any fine in default of payment of which such imprisonment might be adjudged.

*Stipendiary Magistrates Act.*

police district, within which no police court is established, may commit certain offenders to any gaol in and for the county, &c., in which offence shall have been committed.

Repeal of certain acts and parts of acts herein named.

VIII. And whereas an act was passed in the fifty-ninth year of king George the Third, chapter twenty-eight, "to empower magistrates to divide the Court of Quarter Sessions," which act has been amended by section four of an act of the sessions holden in the seventh year of king William the Fourth and the first year of her Majesty, chapter nineteen, and by section four of an act of the session holden in the fifth and sixth years of her Majesty, chapter thirty-eight; and it is expedient to make further provision in relation to the division of courts of quarter sessions: the said act of the fifty-ninth year of king George the Third and the said sections shall be repealed, but not so as to affect any orders, rules, and regulations made before the passing of this act.

IX. Whenever and so often as any court of quarter sessions or general sessions or adjourned quarter sessions of the peace is assembled for the despatch of business, the justices then present may, if and when in their discretion they see fit so to do, appoint two or more justices, one of whom shall be of the quorum, to form a second court for the purpose of hearing and determining such business as may be referred to them, and the proceedings by and before such second court shall be as good and effectual in the law, to all intents and purposes, as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting, and shall be enrolled and recorded accordingly.

Power to divide courts of quarter sessions, general sessions and adjourned sessions.

X. When a second court is formed as aforesaid, and orders, rules, and regulations have been made for the apportionment of business, such orders, rules, and regulations shall continue in force as long as may be thought expedient, without the necessity of renewing such orders, rules and regulations at each succeeding session.

Regulations made for the apportionment of business need not be renewed at each session.

XI. The clerk of the peace or his deputy, wherever a second court is formed as aforesaid, shall appoint a fit and sufficient person to record the proceedings so had before the justices at such second court, and such proceedings shall be delivered over to the clerk of the peace or his deputy, and shall be deemed to be a part of the records of the session, as if the same proceedings had been recorded by the clerk of the peace himself; and it shall be lawful for the justices assembled at the sessions to make an order upon the treasurer of the county to pay to the clerk of the peace such sum as they shall deem a fit and reasonable remuneration to the clerk of the peace for such purposes as aforesaid; and it shall be lawful for such justices to appoint an additional crier, and to grant him such remuneration (to be paid by the treasurer of the county) as they deem reasonable.

Clerk of the peace to appoint a person to record the proceedings of such separate court.

XII. Every sentence pronounced by any court of general or quarter sessions or adjourned sessions of the peace shall take effect from the time of the same being pronounced, unless the court otherwise directs.

Time from which sentences of certain courts shall take effect.

- 21 & 22 Vict. c. 73. **XIII.** It shall be lawful for any stipendiary magistrate, with the approval of the Secretary of State for the Home Department, to appoint a deputy, who shall have practised as a barrister-at-law for at least seven years, to act for him for any time or times not exceeding six weeks in any consecutive period of twelve calendar months; and every deputy so appointed, during the time for which he shall be so appointed, shall have all the powers and perform all the duties of the stipendiary magistrate for whom he shall have been so appointed.
- Stipendiary Magistrates Act.*
- Stipendiary magistrate may appoint a deputy with approval of Secretary of State.
- Power to appoint county stipendiary magistrates to be magistrates of the metropolitan police courts.
- XIV.** It shall be lawful for her Majesty to appoint any stipendiary magistrate acting for any city, town, liberty, borough or place in England or Wales to be a magistrate of any one of the police courts of the metropolitan police district, although such stipendiary magistrate shall not have practised as a barrister during at least seven years then last past, nor shall have practised as a barrister for four years then last past, having previously practised as a certificated special pleader for three years below the bar.
- XV.** This act shall extend only to England.
- Extent of act.

## DRAFTS ON BANKERS LAW AMENDMENT ACT.

21 & 22 VICT. CAP. 79, SECTS. 3, 5.

*An Act to amend the Law relating to Cheques or Drafts on Bankers.—*  
[2nd August, 1858.]

- Persons obliterating, &c. crossing with intent to defraud, guilty of felony.
- III.** If any person shall obliterate, add to, or alter any such crossing with intent to defraud, or offer, utter, dispose of, or put off with intent to defraud, any cheque or draft on a banker, whereon such fraudulent obliteration, addition, or alteration has been made, knowing it to have been so made, such person shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or to such other punishment as is enacted and provided for those guilty of forgery of bills of exchange in the statute in that case made and provided.
- Interpretation of the word "banker."
- V.** In the construction of this act the word "banker" shall include any person or persons, or corporation, or joint stock company, acting as a banker or bankers.

## MEDICAL PRACTITIONERS ACT.

21 &amp; 22 VICT. CAP. 90, SECTS. 38, 39.

*An Act to regulate the Qualifications of Practitioners in Medicine and Surgery.*—[2nd August, 1848.]

XXXVIII. Any registrar who shall wilfully make or cause to be made any falsification in any matters relating to the register shall be deemed guilty of a misdemeanor in England or Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be imprisoned for any term not exceeding twelve months. Penalty on wilful falsification of register.

XXXIX. If any person shall wilfully procure or attempt to procure himself to be registered under this act, by making or producing or causing to be made or produced any false or fraudulent representation or declaration, either verbally or in writing, every such person so offending and every person aiding and assisting him therein, shall be deemed guilty of a misdemeanor in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be sentenced to be imprisoned for any term not exceeding twelve months. Penalty for obtaining registration by false representations.

## MISCELLANEOUS PRECEDENTS.

## No. I.

*Indictment for Conspiracy between Bankrupt and others, feloniously and clandestinely to remove and conceal goods of said Bankrupt, with intent to defeat Creditors; with counts for conspiring fraudulently to procure goods from tradesmen, with the intent eventually of so removing and concealing them.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen  
to wit. } upon their oath present, that before  
the committing of the offence hereinafter mentioned, J. M., late of Bell-street, Paddington, and of Long-acre, both in the county of Middlesex, and also of Melbourne, Australia, coachmaker, dealer and chapman, was a trader within the meaning of the laws then in force relating to bankrupts in England, and liable to become bankrupt, and for six calendar months next immediately preceding the filing the petition hereinafter mentioned, had resided and carried on business within the London district of the Court of Bankruptcy, to wit, at Bell-street, Paddington, and Long-acre, aforesaid; and that the said J. M., being and whilst he was such trader as aforesaid, was justly and truly indebted unto one S. S. in the sum of 50*l.* and upwards, to wit, in the sum of 274*l.*, and to divers other creditors in divers other sums of money; and that the said J. M., being such trader, and whilst he was so indebted as aforesaid, did afterwards commit an act of bankruptcy, within the true intent and meaning of the law then in force relating to bankrupts, by filing, to wit, on the 28th day of May, A. D. 1857, a declaration in writing, in the form contained in Schedule D. to the Bankrupt Law Consolidation Act, 1849, annexed, signed by him, the said J. M., and attested by an attorney, that he was unable to meet his engagements. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon and afterwards, and within two months after the filing of such declaration as aforesaid, to wit, on the said 28th day of May, A. D. 1857, the said S. S., according to the form of the statute in such case made and provided, and in the form specified in Schedule M. to the said Bankrupt Law Consolidation Act, 1849, annexed, did present his petition for adjudication of bankruptcy, against the said J. M., to the Court of Bankruptcy for the London district, such Court being the Court for the district within which the said J. M. had resided and carried on business, within six months next immediately preceding the said time of filing the said petition, to wit, at Basinghall-street, in the City of London; which said petition was then and there filed of record in the said Court of Bankruptcy, in the office of the Chief Registrar of the said Court. And the said S. S. did then and there, to wit, on the said 28th day of May, A. D. 1857, duly verify the truth of the said petition, and the several allegations therein contained, upon his oath, by an affidavit in the form specified in

Schedule N. to the said Bankrupt Law Consolidation Act, 1849, annexed. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and before the commission of the offence hereinafter in this count mentioned, to wit, on the 28th day of May, A. D. 1857, the said Court of Bankruptcy did, under the said petition, proceed to receive, and did receive, proof of the said debt, and of the trading and act of bankruptcy committed by the said J. M. as aforesaid; and then and there, to wit, on the said 28th day of May, A. D. 1857, upon good proof upon oath, made to and before the said Court of Bankruptcy, of the said debt, and of the said debt having accrued and been due to the said S. S. previous to the said act of bankruptcy, and of the said act of bankruptcy committed as aforesaid, and of the several matters required to be proved in that behalf, the said Court of Bankruptcy did duly declare and adjudge the said J. M. bankrupt, within the true intent and meaning of the Law of Bankruptcy, according to the form of the statute in that behalf, which said adjudication hath never been reversed, annulled, or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time when the said J. M. was so adjudged and declared bankrupt as hereinbefore is mentioned, and at the time of the commission of the offence hereinafter mentioned, &c, the said J. M., was possessed of divers goods and chattels then being and forming part of the personal estate of the said J. M., and of the value of 10*l.* and upwards, to wit, six piano-fortes, 1500 yards of woollen cloth, ten dozen carriage lamps, ninety-four saddles, and 2000 gallons of varnish, of great value, to wit, of the value of 5000*l.*, all which goods and chattels it then became and was the duty of the said J. M., as such bankrupt as aforesaid, to disclose, discover, and yield up, to the said Court of Bankruptcy, for the benefit of the creditors of him the said J. M., in accordance with the provisions of the law then in force relating to bankruptcy. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and whilst the said J. M. was so adjudged bankrupt as aforesaid, and whilst the said J. M. was so as aforesaid possessed of the said goods and chattels as hereinbefore mentioned, the said J. M., S. M., and A. S., both late of 113, Long-acre, aforesaid, coachmakers, well knowing the premises, and being evil disposed persons, and wilfully and wickedly intending to convert the said goods and chattels to their own use and benefit, and to defraud and deprive the said S. S., and all other the creditors of the said J. M. of the same, and of the benefit thereof, did, amongst themselves, to wit, on the said 28th day of May, A. D. 1857, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, unlawfully conspire, combine, confederate, and agree together, feloniously and clandestinely to remove and conceal, and to aid and assist one another in removing and concealing the said goods, chattels and effects hereinafter specified, to and in divers secret places unknown to the said Court of Bankruptcy and to the creditors of the said J. M., to the end that the said J. M., in collusion with the said S. M. and A. S., on his examination as such bankrupt before the said Court of Bankruptcy, touching his trade dealings and estate, and as to what had been done with the said estate, might be enabled to conceal and make default in discovering, and should feloniously conceal and omit to discover the said goods, chattels, and effects, part of the estate of the said J. M. as aforesaid, and how the same should have been disposed of, and in fraud of the creditors of the said J. M., wrongfully to convert the same goods, chattels, and effects to the use of the said J. M., S. M.

*Precedents.*

## No. I.

Indictment for conspiracy between bankrupt and others, feloniously and clandestinely to remove and conceal goods of said bankrupt, with intent to defeat creditors; with counts for conspiring fraudulently to procure goods from tradesmen, with the intent eventually of so removing and concealing them.

*Precedents.*

Indictment for conspiracy between bankrupt and others, feloniously and clandestinely to remove and conceal goods of said bankrupt, with intent to defeat creditors; with counts for conspiring fraudulently to procure goods from tradesmen, with the intent eventually of so removing and concealing them.

and A. S., and by the several means aforesaid, as well to deceive the said Court of Bankruptcy in the premises, as to defraud the said S. S. and other the creditors of the said J. M., of the said goods, chattels and effects; to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

*Second count.*—And the jurors for our Lady the Queen, upon their oath aforesaid, do further present, that the said J. M., S. M., and A. S., being evil disposed persons, did, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, amongst themselves unlawfully conspire, combine, confederate, and agree together to ascertain and discover divers merchants and traders in London and elsewhere who should or might be ready and willing to sell, deliver, and supply goods, chattels, and merchandise, on credit to the said J. M. as a trader, and by divers false pretences to be made by the said J. M. and by the said S. M. and A. S. in collusion with him, that he, the said J. M. required the same in carrying on business as a trader and in dealing with and supplying his customers in the ordinary course of business, to obtain and procure from such merchants and traders divers goods, chattels, and merchandise sold and dealt in by such merchants and traders respectively, and belonging to such merchants and traders respectively, and to cheat and defraud such merchants and traders of such goods, chattels, and merchandise, and of the price and value thereof, to the great damage of such merchants and traders, and against the peace of our Lady the Queen, her crown and dignity.

*Third count.*—And the jurors for our Lady the Queen, upon their oath aforesaid, further present, that the said J. M., S. M., and A. S., being evil disposed persons, did, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, amongst themselves unlawfully conspire, combine, confederate, and agree together to ascertain and discover divers merchants and traders in London and elsewhere who should or might be ready and willing to sell, deliver, and supply goods, chattels, and merchandise, on credit to the said J. M. as a trader and for the purpose of his trade, and by divers false pretences, and by divers unlawful, deceitful, and fraudulent ways, means, devices, artifices, stratagema, and contrivances, to be resorted to by the said J. M., and the said S. M. and A. S. in collusion with him, to obtain and acquire to themselves from such merchants and traders, and to aid and assist one another in so obtaining and acquiring divers goods, chattels, and merchandise, of and belonging to such merchants and traders respectively, and to cheat and defraud them of the same and the price and value thereof, to the great damage of such merchants and traders respectively, and against the peace of our Lady the Queen, her crown and dignity.

*Fourth count.*—And the jurors for our Lady the Queen, upon their oath aforesaid, do further present, that the said J. M., S. M., and A. S., being evil disposed persons, did, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, amongst themselves unlawfully conspire, combine, confederate, and agree together, by divers false pretences to be made by the said J. M., and by the said S. M. and A. S. in collusion with him, that he the said J. M. required the same in carrying on business as a trader and in dealing with his customers in the ordinary course of business, to obtain and procure from B. R. divers goods and chattels of him the said B. R., with intent to cheat and defraud him the said B. R. of the same and of the price



and value thereof, to the great damage of the said B. R., and against the peace of our Lady the Queen, her crown and dignity. *Precedents.*

*Fifth count.*—And the jurors for our Lady the Queen, upon their oath aforesaid, further present, that the said J. M., S. M., and A. S., being evil disposed persons, did, in the said county of Middlesex, and within the jurisdiction of the said Central Criminal Court, amongst themselves unlawfully conspire, combine, confederate, and agree together by divers false pretences, and by divers unlawful, deceitful, and fraudulent ways, means, devices, artifices, stratagems, and contrivances, to obtain and procure from B. R. divers goods and chattels of him the said J. M., with intent to cheat and defraud the said B. R. of the same, and of the price and value thereof, to the great damage of the said B. R., and against the peace of our Lady the Queen, her crown and dignity.

Indictment for conspiracy between bankrupt and others, feloniously and clandestinely to remove and conceal goods of said bankrupt, with intent to defeat creditors; with counts for conspiring fraudulently to procure goods from tradesmen, with the intent eventually of so removing and concealing them.

## No. II.

*Indictment under the 253rd section of the Bankrupt Law Consolidation Act, against a Bankrupt for having, under the false pretence of carrying on business in the ordinary course of trade, obtained, within three months of the bankruptcy, Goods on Credit, with intent to defraud the owner thereof.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen,  
to wit. } upon their oath present, that, heretofore and after the making, passing, and coming into operation of a certain act of Parliament, made and passed in a session of Parliament holden in the twelfth and thirteenth years of the reign of Her present Majesty Queen Victoria, called the Bankrupt Law Consolidation Act, 1849, and after the making, passing, and coming into operation of a certain act of Parliament, made and passed in a session of Parliament holden in the fifteenth and sixteenth years of the reign of Her present Majesty Queen Victoria, intituled, *An Act to abolish the Office of Lord Chancellor's Secretary of Bankrupts, and to regulate the Office of Chief Registrar of the Court of Bankruptcy*, and after the making, passing, and coming into operation of a certain other act of Parliament, made and passed in a session of Parliament holden in the seventeenth and eighteenth years of the reign of her present Majesty Queen Victoria, and called the Bankruptcy Act, 1854, and before and at the time of the commission of the offence hereinafter in this count mentioned, that J. M., of No. 56, Bell-street, Paddington, and of Long-acre, both in the county of Middlesex, and also of Melbourne, Australia, coachmaker, dealer and chapman, was a trader within the meaning of the laws then in force relating to bankrupts in England, and liable to become bankrupt, and for six calendar months next immediately preceding the time of the filing the petition hereinafter in this count mentioned, had resided and carried on business within the London district of the Court of Bankruptcy, to

*Precedents.*

## No. II.

Indictment  
under the  
253rd section  
of the Bankrupt  
Law Consolida-  
tion Act,  
against a  
bankrupt for  
having, under  
the false  
pretence of  
carrying on  
business in the  
ordinary course  
of trade,  
obtained, within  
three months of  
the bankruptcy,  
goods on credit,  
with intent to  
defraud the  
owner thereof.

wit, at Bell-street, Paddington, and Long-acre aforesaid, and that the said J. M. being, and whilst he was such trader as aforesaid and was liable to become bankrupt as aforesaid was, justly and truly indebted unto one S. S. in the sum of 50*l.* and upwards, to wit, in the sum of 274*l.*, and to divers other creditors in divers other sums of money, and that the said J. M. being such trader as aforesaid, and whilst he was so indebted as aforesaid, afterwards, and after the making, passing, and coming into operation of the said three several acts of Parliament, did commit an act of bankruptcy within the true intent and meaning of the said several acts of Parliament, to wit, by filing, to wit, on the 28th day of May, A.D. 1857, in the office of the Chief Registrar of the Court of Bankruptcy, a declaration in writing in the form contained in Schedule D to the said Bankrupt Law Consolidation Act, 1849, annexed, signed by him the said J. M., and attested by an attorney, that he was unable to meet his engagements. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, and afterwards, and within two months after the filing of such declaration as aforesaid, to wit, on the 28th day of May, A.D. 1857, the said S. S. according to the form of the statute in such case made and provided, and in the form specified in Schedule M to the said Bankrupt Law Consolidation Act, 1849, annexed, did present his petition for adjudication of bankruptcy against the said J. M. to the Court of Bankruptcy for the London district, such court being the Court of Bankruptcy for the district within which the said J. M. had resided and carried on business for six calendar months next immediately preceding the said time of filing the said petition as hereinbefore in this count mentioned, to wit, in Basinghall-street, in the city of London, and in and by the said petition did show to the said Court of Bankruptcy, that the said J. M. being such trader as aforesaid, and having resided and carried on business for six calendar months next immediately preceding the date and filing of the said petition, within the district of the said Court of Bankruptcy, was then indebted to the said petitioner in the sum of 274*l.*, and that the said petitioner had been informed and believed that the said J. M. did then lately commit an act of bankruptcy within the true intent and meaning of the law of bankruptcy, and did by the same petition therefore pray the said Court of Bankruptcy that on proof of the requisites in that behalf adjudication of bankruptcy might be made against the said J. M., which said petition was then and there filed of record in the said Court of Bankruptcy, in the office of the Chief Registrar of the said court, and the said S. S. did then and there, to wit, on the said 28th day of May, A.D. 1857, in and before the said Court of Bankruptcy duly verify the truth of the said petition, and the several allegations therein contained, upon his oath, by an affidavit in the form specified in Schedule N to the said Bankrupt Law Consolidation Act, 1849, annexed, as by the said petition and the said verification thereof filed in the said Court of Bankruptcy, reference being thereto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, and afterwards, and after the commission of the said offence hereinafter in this count mentioned, to wit, on the 28th day of May, A.D. 1857, the said Court of Bankruptcy, did, under the said petition proceed to receive, and did receive, proof of the said debt, and of the trading, and of the said act of bankruptcy committed by the said J. M. as aforesaid, and thereupon, to wit, on the said 28th day of May, A.D. 1857, upon good proof upon

oath made to and before the said Court of Bankruptcy of the said debt, and of the said debt having accrued and been due to the said S. S. previously to the said act of bankruptcy, and of the said trading of the said J. M., and of the said act of bankruptcy committed as aforesaid, and of the several matters required to be proved in that behalf, the said Court of Bankruptcy did duly declare and adjudge the said J. M. bankrupt, within the true intent and meaning of the law of bankruptcy, according to the form of the statute in that behalf, which said adjudication hath never been reversed, annulled, or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. M., within three calendar months next preceding the filing of the said petition for adjudication of bankruptcy, and whilst he was such trader as aforesaid, to wit, on the 28th day of April, A. D. 1857, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, wilfully, wickedly, knowingly, and unlawfully, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, did obtain on credit from J. B. and others 500 galvanized and corrugated iron sheets of the value of 137*l.* 4*s.* 10*d.*; 5 cast iron galvanized columns of the value of 34*l.* 15*s.* 4*d.*; 11 galvanized iron rivets of the value of 2*l.* 1*s.* 2*d.*; and 11 galvanized iron bars of the value of 2*l.* 10*s.* 8*d.*, of all which said goods and chattels the said J. B. and others were then the owners, with intent thereby then and there to defraud the said J. B. and others thereof, whereas in truth and in fact, the said J. M. was not at the time he so obtained the said goods and chattels under the false colour and pretence as aforesaid, carrying on business or dealing in the ordinary course of trade as he the said J. M., at the time he so obtained the said goods and chattels as aforesaid, then and there well knew, to the great damage of the said J. B. and others, and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Precedents.*

No. II.

Indictment  
under the  
253rd section  
of the Bankrupt  
Law Consolida-  
tion Act,  
against a  
bankrupt for  
having, under  
the false  
pretence of  
carrying on  
business in the  
ordinary course  
of trade,  
obtained, within  
three months of  
the bankruptcy,  
goods on credit,  
with intent to  
defraud the  
owner thereof.

## No. III.

*Indictment against Bankrupt and others for feloniously concealing and embezzling the personal estate of the Bankrupt, to the value of 10l. and upwards, with intent to cheat and defraud the Creditors, under the 251st section of the Bankrupt Law Consolidation Act; with counts charging the Bankrupt as principal, and the other defendants as being present, aiding and abetting.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen,  
to wit. } upon their oath present, that heretofore and after the making and passing and coming into operation of a certain act of Parliament, made and passed in a session of Parliament holden in the twelfth and thirteenth years of the reign of her present Majesty Queen Victoria, called the Bankrupt Law Consolidation Act, 1849, and after the making, passing, and coming into operation of a certain act of Parliament, made and passed in a session of Parliament holden in the fifteenth and sixteenth years of the reign of her present Majesty Queen Victoria, intituled, *An Act to abolish the Office of Lord Chancellor's Secretary of Bankrupts, and to regulate the Office of Chief Registrar of the Court of Bankruptcy*, and after the making, passing, and coming into operation of a certain other act of Parliament, made and passed in a session of Parliament holden in the seventeenth and eighteenth years of the reign of her present Majesty Queen Victoria, and called the Bankruptcy Act, 1854, and before the commission of the offence hereinafter in this count mentioned, J. M., late of No. 56, Bell-street, Paddington, and of Long-acre, both in the county of Middlesex, and also of Melbourne, Australia, coachmaker, dealer and chapman, was a trader within the meaning of the laws then in force relating to bankrupts in England, and liable to become bankrupt, and for six calendar months next immediately preceding the time of the filing the petition hereinafter in this count mentioned, had resided and carried on business within the London district of the Court of Bankruptcy, to wit, at Bell-street, Paddington, and Long-acre, aforesaid; and that the said J. M., being, and whilst he was, such trader as aforesaid, and so liable to become bankrupt as aforesaid, was justly and truly indebted unto one S. S. in the sum of 50l. and upwards, to wit, in the sum of 274l., and to divers other creditors in divers other sums of money; and that the said J. M. being such trader as aforesaid, and whilst he was so indebted as aforesaid, afterwards, and after the making, passing, and coming into operation of the said three several acts of Parliament, did commit an act of bankruptcy, within the true intent and meaning of the said three several acts of Parliament, to wit, by filing, to wit, on the 28th day of May, A.D. 1857, in the office of the Chief Registrar of the Court of Bankruptcy a declaration in writing, in the form contained in Schedule D to the said Bankrupt Law Consolidation Act, 1849, annexed, signed by him the said J. M., and attested by an attorney, that he was unable to meet his engagements. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, afterwards, and within two months

after the filing of such declaration as aforesaid, to wit, on the said 28th day of May, in the year of our Lord 1857, the said S. S., according to the form of the statute in such case made and provided, and in the form specified in Schedule M to the said Bankrupt Law Consolidation Act, 1859, annexed, did present his petition for adjudication of bankruptcy against the said J. M., to the Court of Bankruptcy for the London district, such court being the Court of Bankruptcy for the district within which the said J. M. had resided and carried on business for six calendar months next immediately preceding the time of filing the said petition, as hereinbefore in this count mentioned, to wit, in Basinghall-street, in the city of London, and in and by the said petition did show to the said Court of Bankruptcy that the said J. M., being such trader as aforesaid, and having resided and carried on business for six calendar months next immediately preceding the date and filing of the said petition, within the district of the said Court of Bankruptcy, was then indebted to the said petitioner in the sum of 274*l.*, and that the said petitioner had been informed and believed that the said J. M. did then lately commit an act of bankruptcy, within the true intent and meaning of the law of bankruptcy, and did by the same petition therefore pray the said Court of Bankruptcy that, on proof of the requisites in that behalf, adjudication of bankruptcy might be made against the said J. M., which said petition was then and there filed of record in the said Court of Bankruptcy, in the office of the Chief Registrar of the said court. And the said S. S. did then and there, to wit, on the said 28th day of May, in the year of our Lord 1857, in and before the said Court of Bankruptcy, duly verify the truth of the said petition, and the several allegations therein contained, upon his oath, by an affidavit in the form specified in the Schedule N to the said Bankrupt Law Consolidation Act, 1849, annexed, as by the said petition and the said verification thereof, filed in the said Court of Bankruptcy, reference being thereto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, and afterwards, and before the commission of the said offence hereafter in this count mentioned, to wit, on the said 28th day of May, in the year of our Lord 1857, the said Court of Bankruptcy did, under the said petition, proceed to receive, and did receive, proof of the said debt, and of the trading, and of the said act of bankruptcy committed by the said J. M. as aforesaid; and then, to wit, on the said 28th day of May, in the year of our Lord 1857, upon good proof upon oath made to and before the said Court of Bankruptcy of the said debt, and of the said debt having accrued and been due to the said S. S. previously to the said act of bankruptcy, and of the said trading of the said J. M., and of the said act of bankruptcy committed as aforesaid, and of the several matters required to be proved in that behalf, the said Court of Bankruptcy did duly declare and adjudge the said J. M. bankrupt within the true intent and meaning of the law of bankruptcy, according to the form of the statute in that behalf, which said adjudication hath never been reversed, annulled, or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and after the said J. M. had been so duly declared and adjudged bankrupt as aforesaid, and whilst the said J. M. was adjudged such bankrupt, the said J. M., and S. M. and A. S., both late of No. 113, Long-acre, in the county of Middlesex, coachmakers, well knowing the premises, wilfully, wickedly, and feloniously, to wit, in the county of Middlesex, and within the jurisdiction of the said Central Criminal

*Precedents.*

No. III.

Indictment  
against  
bankrupt and  
others for  
feloniously  
concealing and  
embezzling the  
personal estate  
of the bankrupt,  
to the value of  
10*l.* and  
upwards, with  
intent to cheat  
and defraud the  
creditors, under  
the 251st sect.  
of the Bankrupt  
Law Consolida-  
tion Act; with  
counts charging  
the bankrupt  
as principal,  
and the other  
defendants as  
being present,  
aiding and  
abetting.

*Precedents.*

## No. III.

Indictment  
against  
bankrupt and  
others for  
feloniously  
concealing and  
embezzling the  
personal estate  
of the bankrupt,  
to the value of  
10*l.* and  
upwards, with  
intent to cheat  
and defraud the  
creditors, under  
the 251st sect.  
of the Bankrupt  
Law Consolida-  
tion Act; with  
counts charging  
the bankrupt  
as principal,  
and the other  
defendants as  
being present,  
aiding and  
abetting.

Court, did remove, conceal, and embezzle a certain part of the personal estate of the said J. M. to the value of 10*l.* and upwards, that is to say, 100 gallons of body varnish of the value of 150*l.*; 100 gallons of carriage varnish of the value of 120*l.*; 100 gallons of second body varnish of the value of 120*l.*; 50 gallons of prepared black varnish of the value of 55*l.*; 50 gallons of second prepared black varnish of the value of 50*l.*; 100 gallons of gold size of the value of 90*l.*; 500 other gallons of body varnish of the value of 750*l.*; 100 other gallons of best body varnish of the value of 150*l.*; 50 other gallons of the best carriage varnish of the value of 60*l.*; 50 other gallons of best black japan varnish of the value of 55*l.*; 100 other gallons of the best body varnish of the value of 150*l.*; 100 other gallons of the best carriage varnish of the value of 100*l.*; 100 other gallons of best gold size of the value of 70*l.*; and 50 other gallons of black japan varnish of the value of 50*l.*; and 47 packing cases of the value of 12*l.*, with intent to defraud the creditors of the said J. M., against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and after the making, passing, and coming into operation of the three several acts of Parliament in the first count of this indictment mentioned, and before the time of the commission of the offence hereinafter in this count mentioned, the said J. M. was a trader within the meaning of the laws then in force relating to bankrupts in England, and liable to become bankrupt, and for six calendar months next immediately preceding the time of the filing the petition hereinafter in this count mentioned had resided and carried on business within the London district of the Court of Bankruptcy, to wit, at Bell-street, Paddington, and Long-acre, both in the county of Middlesex aforesaid; and that the said J. M. being, and whilst he was such trader as aforesaid and so liable to become bankrupt as aforesaid was, justly and truly indebted unto one S. S. in the sum of 50*l.* and upwards, to wit, in the sum of 274*l.*, and to divers other creditors in divers other sums of money; and that the said J. M., being such trader as aforesaid, and whilst he was so indebted as aforesaid, and after the making, passing, and coming into operation of the said three several acts of Parliament, did commit an act of bankruptcy, within the true intent and meaning of the three several acts of Parliament, to wit, by filing, to wit, on the 28th day of May, in the year of our Lord 1857 in the office of the Chief Registrar of the Court of Bankruptcy, a declaration in writing, in the form contained in Schedule D to the said Bankrupt Law Consolidation Act, 1849, annexed, signed by him the said J. M., and attested by an attorney, that he was unable to meet his engagements. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, and afterwards, and within two months after the filing of such declaration as aforesaid, to wit, on the said 28th day of May, in the year of our Lord 1857, the said S. S., according to the form of the statute in such case made and provided, and in the form specified in Schedule M to the said Bankrupt Law Consolidation Act, 1849, annexed, did present his petition for adjudication of bankruptcy against the said J. M., to the Court of Bankruptcy for the London district, such court being the Court of Bankruptcy for the district within which the said J. M. had resided and carried on business for six calendar months next immediately preceding the said time of filing the said petition, as hereinafter in this count mentioned, to wit, in Basinghall-street, in the city of London, and in and by the said petition

did show to the said Court of Bankruptcy that the said J. M., being such trader as aforesaid, and having resided and carried on business for six calendar months next immediately preceding the date and filing of the said petition, within the district of the said Court of Bankruptcy, was then indebted to the said petitioner in the sum of 274*l.*; and that the said petitioner had been informed and believed that the said J. M. did then lately commit an act of bankruptcy, within the true intent and meaning of the law of bankruptcy, and did by the same petition therefore pray the said Court of Bankruptcy that, on proof of the requisites in that behalf, adjudication of bankruptcy might be made against the said J. M., which said petition was then and there filed of record in the said Court of Bankruptcy, in the office of the Chief Registrar of the said court, and the said S. S. did then and there, to wit, on the said 28th day of May, in the year of our Lord 1857, in and before the said Court of Bankruptcy duly verify the truth of the said petition and the several allegations therein contained, upon his oath, by an affidavit in the form specified in Schedule N to the said Bankrupt Law Consolidation Act, 1849, annexed, as by the said petition and the said verification thereof, filed in the said Court of Bankruptcy, reference being thereto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present, that thereupon, and afterwards, and before the commission of the said offence hereinafter in this count mentioned, to wit, on the said 28th day of May, in the year of our Lord 1857, the said Court of Bankruptcy did under the said petition proceed to receive, and did receive, proof of the said debt and of the trading, and of the said act of bankruptcy committed by the said J. M. as aforesaid, and then, to wit, on the said 28th day of May, A. D. 1857, upon good proof upon oath made to and before the said Court of Bankruptcy of the said debt, and of the said debt having accrued and been due to the said S. S. previously to the said act of bankruptcy, and of the said trading, of the said J. M., and of the said act of bankruptcy committed as aforesaid, and of the several matters required to be proved in that behalf, the said Court of Bankruptcy did duly declare and adjudge the said J. M. bankrupt, within the true intent and meaning of the law of bankruptcy, according to the form of the statute in that behalf, which said adjudication hath never been reversed, annulled, or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and after the said J. M. had been so duly declared and adjudged bankrupt as aforesaid, and whilst he was adjudged such bankrupt, the said J. M. wilfully, wickedly, and feloniously, to wit, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, did remove, conceal, and embezzle a certain part of his personal estate to the value of 10*l.* and upwards, that is to say, 100 gallons of body varnish, &c., [*as in first count*], with intent to defraud the creditors of him the said J. M. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. M. and A. S. then and there feloniously were present, aiding, abetting, and assisting the said J. M. the felony aforesaid to do and commit, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Third count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making, passing, and coming into operation of a certain act of Parliament, made and passed in a session of Parliament, holden in the twelfth and thirteenth years of the reign of her present

*Precedents.*

No. III.

Indictment against bankrupt and others for feloniously concealing and embezzling the personal estate of the bankrupt, to the value of 10*l.* and upwards, with intent to cheat and defraud the creditors, under the 251st sect. of the Bankrupt Law Consolidation Act; with counts charging the bankrupt as principal and the other defendants as being present, aiding and abetting.

*Precedents.*

## No. III.

Indictment  
against  
bankrupt and  
others for  
feloniously  
concealing and  
embezzling the  
personal estate  
of the bankrupt,  
to the value of  
10*l.* and  
upwards, with  
intent to cheat  
and defraud the  
creditors, under  
the 251st sect.  
of the Bankrupt  
Law Consolida-  
tion Act; with  
counts charging  
the bankrupt  
as principal,  
and the other  
defendants as  
being present,  
aiding and  
abetting.

Majesty Queen Victoria, called the Bankrupt Law Consolidation Act, 1849, the said J. M. was, to wit, on the 28th day of May, A.D. 1857, adjudged bankrupt in and by the Court of Bankruptcy for the London district. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and after the said J. M. had been so adjudged bankrupt as aforesaid, and whilst he was adjudged such bankrupt, the said J. M., and the said S. M. and A. S., wilfully, wickedly, and feloniously, to wit, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, did remove, conceal, and embezzle a certain part of the personal estate of the said J. M. to the value of 10*l.* and upwards, that is to say, 100 gallons of body varnish of the value of 150*l.*, &c., [*as in first count*], with intent to defraud the creditors of the said J. M., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making, passing, and coming into operation of a certain act of Parliament, made and passed in a session of Parliament holden in the twelfth and thirteenth years of the reign of her present Majesty Queen Victoria, called the Bankrupt Law Consolidation Act, 1849, the said J. M. was, to wit, on the 28th day of May, A.D. 1857, adjudged bankrupt in and by the Court of Bankruptcy for the London district. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and after the said J. M. had been so adjudged bankrupt as aforesaid, and whilst he was adjudged such bankrupt, the said J. M. wilfully, wickedly, and feloniously, to wit, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, did remove, conceal, and embezzle a certain part of his personal estate to the value of 10*l.* and upwards, that is to say, 100 gallons of body varnish, &c., [*as in first count*], with intent to defraud the creditors of him the said J. M. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. M. and A. S. then and there feloniously were present, aiding, abetting, and assisting the said J. M. the felony aforesaid to do and commit, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.



## STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW PASSED IN THE SESSION OF  
PARLIAMENT, 1859.

## BURIAL PLACES ACT.

22 VICT. CAP. 1.

*An Act more effectually to prevent Danger to the Public Health from  
Places of Burial.*—[25th March, 1859.]

**W**HEREAS by section twenty-three of an act passed in the session 20 & 21 Vict. holden in the Twentieth and Twenty-first years of Her Majesty, c. 8. chapter eighty-one, "to amend the Burial Acts," it was enacted that it should be lawful for Her Majesty, upon the representation of one of Her Majesty's principal Secretaries of State, by and with the advice of Her Privy Council, from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as might have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health; and such churchwardens or other persons should do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof should be paid out of the poor-rates of the parish: And whereas it is expedient to amend the said enactment as hereinafter mentioned: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. Where it appears to one of Her Majesty's principal Secretaries of State, on the representation of any person authorised by him to inspect any vaults or place of burial in relation to which an Order in Council has been or shall have been issued under the said recited enactment, that any acts which by such Order in Council are ordered to be done by or under the direction of persons other than churchwardens having the care of such vaults or place of burial are not done or performed within a

Where persons having the care of a place of burial neglect to comply with the Order in Council the churchwardens

22 Vict. c. 1.

*Burial Places  
Act.*may act in  
their stead.This and  
recited act to  
be as one.

reasonable time, and according to the intent of such Order in Council, it shall be lawful for such Secretary of State, by writing under his hand, to authorise and direct the churchwardens of the parish in which such vaults or place of burial may be situate forthwith to do or complete the acts in such Order in Council mentioned, or such of them as remain undone, and such order of the Secretary of State shall be obeyed by such churchwardens, and they and all persons acting under their direction shall have the same power of entering and doing all such acts upon the premises to which the Order in Council relates as if the said acts had by the Order in Council been directed to be done by such churchwardens, and such vaults or place of burial had been under their care; and any person who shall obstruct such churchwardens or any others acting under their direction in relation to the premises, or remove or interfere with the works done by such churchwardens, shall be guilty of a misdemeanor.

II. This act shall be read together with the said act of the twentieth and twenty-first years of Her Majesty and the Burial Acts therein mentioned as one act.

### AFFIDAVITS BY COMMISSION, &c. ACT.

22 VICT. CAP. 16, SECT. 4.

*An Act to enable the Judges to appoint Commissioners within Ten Miles of London and in the Isle of Man and the Channel Islands to administer Oaths in Common Law, and to authorise the taking in the Country of Bail in Error, and Recognizances and Bail on the Revenue Side of the Exchequer.*—[19th April, 1859.]

Affidavits, &c.  
to be read and  
made use of  
as other  
affidavits.

IV. All affidavits, declarations, or affirmations taken or made before any commissioner appointed or empowered as aforesaid shall be read and made use of in the said courts respectively, to all intents and purposes, as other affidavits, declarations, or affirmations taken or made in the said courts now are; and all and every person and persons forswearing him, her, or themselves in such affidavit or affidavits, or falsely declaring or affirming in such declarations or affirmations, shall incur and be liable to the same penalties, and be deemed guilty of perjury, as if such affidavit or affidavits, declarations or affirmations, had been made or taken in open court, and may be prosecuted for the same, where such perjury was committed or where such person or persons shall be apprehended on such a charge.

## EVIDENCE BY COMMISSION ACT.

22 VICT. CAP. 20.

*An Act to provide for taking Evidence in Suits and Proceedings pending before Tribunals in Her Majesty's Dominions in Places out of the Jurisdiction of such Tribunals.*—[19th April, 1859.]

**W**HEREAS it is expedient that facilities be afforded for taking evidence in or in relation to actions, suits and proceedings pending before tribunals in Her Majesty's dominions in places in such dominions out of the jurisdiction of such tribunals: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. Where upon an application for this purpose it is made to appear to any court or judge having authority under this act that any court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorised, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge, or any other judge having authority under this act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just, and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such court or judge in a cause depending in such court or before such judge.

Order for examination of witnesses out of the jurisdiction in relation to any suit pending before any tribunal in Her Majesty's possessions.

II. Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

Penalty on persons giving false evidence.

III. Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

IV. Provided also, that every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the court by which, or

Power to person to refuse to answer questions to

22 Vict. c. 16.

*Evidence by  
Commission  
Act.*

criminate  
himself, or  
to produce  
documents.

Certain courts  
and judges to  
have authority  
under this  
Act.

Power to  
judges to  
frame rules, &c.,  
for giving effect  
to provisions of  
this act.

by a judge whereof, or before the judge by whom the order for examination was made, would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause.

V. Her Majesty's superior courts of common law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any supreme court in any of Her Majesty's colonies or possessions abroad, and any judge of any such court, and every judge in any such colony or possession who, by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be courts and judges having authority under this act.

VI. It shall be lawful for the Lord Chancellor of Great Britain, with the assistance of two of the judges of the courts of common law at Westminster, so far as relates to England, and for the Lord Chancellor of Ireland, with the assistance of two of the judges of the courts of common law at Dublin, so far as relates to Ireland, and for two of the judges of the Court of Session, so far as relates to Scotland, and for the chief or only judge of the supreme court in any of Her Majesty's colonies or possessions abroad, so far as relates to such colony or possession, to frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this act, and regulating the procedure under the same.

## REMISSION OF PENALTIES ACT.

22 VICT. CAP. 32.

*An Act to amend the Law concerning the Remission of Penalties.*—[19th April, 1859.]

**W**HEREAS penalties which under penal statutes are made payable to parties other than the Crown cannot be remitted or pardoned by the Crown where no express provision has been made by the statute for that purpose, and it is expedient that the law as to the remission of such penalties should be amended and made uniform: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; that is to say,

Penalties for  
offences may be  
remitted by the  
Crown although  
payable to

I. It shall be lawful for Her Majesty (or in Ireland for the Lord Lieutenant or other Chief Governor or Governors of Ireland) to remit in whole or in part any sum of money which under any act now in force or hereafter to be passed may be imposed as a penalty or forfeiture on a con-

victed offender, although such money may be in whole or in part payable to some party other than the Crown, and to extend the royal mercy to any person who may be imprisoned for non-payment of any sum of money so imposed, although the same may be in whole or in part payable to some party other than the Crown.

22 Vict. c. 32.

*Remission of Penalties Act.*

parties other  
than the  
Crown.

## MANSLAUGHTER ACT.

22 VICT. CAP. 33.

*An Act to Enable Coroners in England to admit to Bail Persons charged with Manslaughter.*—[19th April, 1859.]

**W**HEREAS in many cases inconvenience and expense have been occasioned by the inability of coroners in England to admit to bail persons charged by the verdict of a coroner's jury with the offence of manslaughter: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. In every case in which a coroner's jury shall have found a verdict of manslaughter against any person or persons it shall be lawful for the coroner or deputy-coroner before whom the inquest was taken to accept bail, if he shall think fit, with good and sufficient sureties, for the appearance of the person so charged with the offence of manslaughter at the next assize and general gaol delivery to be holden in and for the county within which the inquest was taken; and thereupon such person if in custody of any bailiff or other officer of the coroner's court, or in any gaol under a warrant of commitment issued by such coroner, shall be discharged therefrom.

In cases of  
manslaughter  
the coroner  
may admit the  
persons  
charged to  
bail.

II. In every case in which any coroner or deputy coroner shall admit any person to bail he shall cause recognizances to be taken in the form given in the schedule to this act, and give a notice thereof to every person so bound, and shall return such recognizances to the then next ensuing assizes, and such coroner or deputy coroner shall be entitled to such fees and charges as the clerks of justices of the peace are by law entitled to on admitting persons charged to bail.

Recognizances  
to be taken.

III. At any time after all the depositions of witnesses shall have been taken, every person against whom any coroner's jury may have found a verdict of manslaughter shall be entitled to have from the person having custody thereof copies of the depositions on which such verdict shall have been found, on payment of a reasonable sum for the same, not exceeding the rate of three-halfpence for every folio of ninety words.

Persons against  
whom coroner's  
juries have  
found verdicts  
of manslaughter  
to be supplied  
with deposi-  
tions.

22 Vict. c. 33.

*Manslaughter  
Act.*

## SCHEDULE.

Be it remembered, that on the                      day of                      in the year of our Lord                      *A. B.* of                      [labourer], *L. M.* of                      , [grocer], and *N. O.* of                      , [butcher], personally came before me, one of Her Majesty's coroners for the [county] of                      , and severally acknowledged themselves to owe to our Lady the Queen the several sums following; that is to say, the said *A. B.* the sum of                      and the said *L. M.* and *N. O.* the sum of                      each, of good and lawful money of Great Britain to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, Her heirs and successors, if he the said *A. B.* fail in the condition endorsed.

Taken and acknowledged the day and year first above mentioned, at                      , before me,

*J. S.,*

Coroner for the [county] of                      .

Condition endorsed.

The condition of the within-written recognizance is such, that whereas a verdict of manslaughter has been found against the said *A. B.* by a jury empannelled to inquire how and by what means                      came by [his] death; if therefore the said *A. B.* shall appear at the next court of oyer and terminer and general gaol delivery to be holden in and for the [county] of                      and there surrender himself into the custody of the keeper of the gaol there, and plead to such inquisition, and take his trial upon the same, and not depart the said court without leave, then the said recognizance shall be void, or else the same shall stand in full force and virtue.

## COMBINATION OF WORKMEN ACT.

22 VICT. CAP. 34.

*An Act to amend and explain an Act of the Sixth Year of the Reign of King George the Fourth, to repeal the Laws relating to the Combination of Workmen, and to make other Provisions in lieu thereof.—*  
[19th April, 1859.]

6 Geo. 4, c. 129.

**W**HEREAS an act was passed in the sixth year of the reign of King George the Fourth, intituled "An Act to repeal the Laws relating to the Combination of Workmen, and to make other Provisions in lieu thereof:" and whereas different decisions have been given on the construction of the said act: be it therefore declared and enacted by the

Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

I. That no workman or other person, whether actually in employment or not, shall, by reason merely of his entering into an agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them shall work, or by reason merely of his endeavouring peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work in order to obtain the rate of wages or the altered hours of labour so fixed or agreed upon or to be agreed upon, shall be deemed or taken to be guilty of "molestation" or "obstruction," within the meaning of the said act, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy : provided always, that nothing herein contained shall authorise any workman to break or depart from any contract or authorise any attempt to induce any workman break or depart from any contract.

22 Vict. c. 34.

*Combination  
of Workmen  
Act.*

Agreements in certain cases not to be deemed "molestation" or "obstruction," within the meaning of the recited act.

## MUNICIPAL ELECTIONS ACT.

22 VICT. CAP. 35, SECTS. 9, 10, 11, 12, 13, 14, 15, and 16.

*An Act to amend the Law relating to Municipal Elections.*—[19th April, 1859.]

IX. If, pending or after any election of councillors, auditors, or assessors, any person shall personate or induce any other person to personate any person entitled to vote at such election or whose name is on the burgess roll then in force, or falsely assume to act in the name or on behalf of any person so entitled to vote, or wilfully make a false answer to any of the questions mentioned in section eighteen of this act, he shall for every such offence be liable, on conviction before two justices in petty sessions, to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour.

Penalty for personation of voters.

X. If, before, pending, or after any election of councillors, auditors, or assessors, any person shall wilfully fabricate, in whole or in part, alter, deface, destroy, abstract, or purloin any nomination or voting paper after the same shall have been duly filled up, he shall for every such offence be liable, on conviction before two justices in petty sessions, to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour.

Penalty for forging nomination or voting papers.

XI. If any person at any election of mayor, councillors, auditors, or assessors for any borough shall be guilty of bribery, he shall for every such offence forfeit the sum of forty shillings to any person who shall sue for the same in the County Court, with full costs of suit ; and any person offending in any case in which, under the act or acts for the

Penalty on persons guilty of bribery at elections.

22 Vict. c. 35. time being in force with respect to the election of members to serve in Parliament for boroughs in England and Wales, the name of the offender may be expunged from the list of voters, being lawfully convicted thereof, shall for the term of six years be disabled to vote in any election in such borough, or in any municipal or parliamentary election whatever, in any part of the United Kingdom, and shall for such term be disabled to hold, exercise, or enjoy any office or franchise to which he then shall or at any time afterwards may be entitled as a burgess of such borough, as if such person were naturally dead.

Definition of bribery.

XII. The word "bribery" shall include anything committed or done before, at, after, or with respect to the election of any mayor, councillors, auditors, or assessors, which if committed or done before, at, after, or with respect to any election of any member to serve in Parliament, would render the person committing or doing the same liable to any pains, penalties, forfeitures, or conviction for bribery, treating, undue influence, corrupt practices, or other offence, under any act or acts for the time being in force with respect to the election of members to serve in Parliament for boroughs in England and Wales.

Appeal.

XIII. If any person shall think himself aggrieved by any conviction under this act, he may appeal therefrom to the next quarter sessions of the peace in and for the county within which is situate the city or borough in which such conviction took place, first giving reasonable notice to the mayor and justice or justices of the peace, as the case may be, of his intention so to do, and entering into recognizance to pay such costs as may be awarded against him.

Time limited for proceedings.

XIV. All proceedings for enforcing any pains, penalties, forfeitures, or convictions under this act shall be commenced within six calendar months from the time when the matter of such proceedings arose.

#### *Title and Extent of Act.*

Short title.

XV. This act may be cited for any purpose as "The Municipal Corporation Act, 1859."

Extent of act.

XVI. This act shall apply to every city, borough and town-corporate specified in the schedules to the said first-mentioned act, and to every municipal corporation in England and Wales erected after the passing of that act, and whether erected by charter under that act or otherwise, and shall be construed and executed as if its provisions formed part of that act, and the acts from time to time in force amending or extending that act.



# INDEX.

## ABDUCTION.

A girl, under the age of sixteen, who was living in her father's house, was induced by the defendant to go to a chapel and be married to him. She was only away from her home for an hour or two, and after her return continued to live with her father as before, he being ignorant of what had taken place. The marriage was never consummated:

Held, that there was sufficient evidence of her having been taken out of her father's possession to satisfy the statute, 9 Geo. 4, c. 31, s. 20. *Reg. v. Baillie*, 238.

Upon the trial of an indictment under 9 Geo. 4, c. 31, s. 20, for taking an unmarried girl, under sixteen, out of the possession of her father, and against his will, it was proved that the prisoner (with whom the girl had previously stayed out for a night) met her by arrangement, and stayed with her away from her father's house for three days, sleeping with her at night, that he took her away without the father's consent in order to gratify his passions, and then allow her to return home, but not with a view of keeping her away from her home permanently:

Held, that the evidence justified a conviction under the above enactment. *Reg. v. Timmins*, 401.

A father, if there be no disqualifying cause, has a right to the custody of a female child up to the age of sixteen, although she be unwilling to live under his care and control:

As to how far parties interfering to keep a girl from the possession of her father render themselves liable to be indicted for misdemeanor, *vide* the judgment in this case. *Ex parte Barford*, 405.

The words of the statute being "unlawfully take," it is not necessary to show a trespass or anything of that nature in the taking, other than the act of taking. *Reg. v. Fraser and Norman*, 446.

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## ACCESSORY.

The first two counts of an indictment charged A. and B. with stealing, and the third charged B. with feloniously receiving. A. was acquitted; no evidence having been offered against him, that he might be a witness against B. Upon his and other evidence, which proved that B. was an accessory before the fact of the stealing, the jury found a general verdict of guilty against B., which was so entered up:

Held, that the conviction was good, the 11 & 12 Vict. c. 46, s. 1, making an accessory before the fact a principal felon, and that therefore the conviction of the principal is not now a condition precedent to the conviction of an accessory before the fact, and that there was no inconsistency in an accessory before the fact being also a receiver. *Reg. v. William Hughes*, 278.

Defendant, an inn-keeper, having an escaped felon in his house, to the policeman, who had remarked "You scoundrel, how dare you harbour a felon?" said "You had better go and find him;" but he did nothing, and the policeman went up stairs and saw the felon make his escape from the window:

Held, to be no evidence of an obstructing of the felon's apprehension.

The indictment charged the defendant as accessory to an escape of a felon from prison by harbouring him after his escape:

Quere, is such a count bad as charging the defendant to be an accessory to a misdemeanor, prison breach being a misdemeanor only. *Reg. v. Green*, 441.

## ADMINISTERING.

Causing to be taken a dangerous or noxious thing, 9 & 10 Vict. c. 25, s. 4. *Reg. v. Vaughan*, 256.

The prisoner being about to leave his situation as manager of a shop, put into the sugar-

basin which was to be used by X., his successor, a quantity of Croton oil (an acrid poison), as the prisoner said, to give X. a good scourging for having told stories of him (the prisoner). X. used some of the sugar, and suffered such dreadful bodily pain as to alarm his doctor for his life. The jury found a verdict of guilty on a count for inflicting upon X. grievous bodily harm:

Quære, whether the prisoner had been guilty of an offence at common law, or under the stat. 14 & 15 Vict. c. 19, s. 4. *Reg. v. Heppingstall*, 111.

#### ANATOMY ACT.

A master of a workhouse, after showing the bodies of deceased paupers in coffins to their relatives, caused the relatives to follow other coffins to the graves, and the appearance of a funeral to be gone through. The relatives of the deceased had not required that the bodies should be interred without anatomical examination, according to the 2 & 3 Will. 4, c. 75, s. 7 (the Anatomy Act). The master of the workhouse then sent the bodies to Guy's Hospital for dissection, and received therefor sums of money in proportion to the number of bodies sent. After dissection, the bodies were buried. The jury found that the master of the workhouse had caused the appearance of funerals to be gone through, with a view to prevent the relatives requiring the bodies to be interred without anatomical examination:

Held, that an indictment charging the master of the workhouse, in one count, with selling the bodies, in another with taking away the bodies for gain to delay the burial with intent to have them dissected, and in a third with intent to sell and dispose of them, could not be sustained, as the master of the workhouse had lawful possession of the bodies within sect. 7 of 2 & 3 Will. 4, c. 75, and the relatives had made no request that the bodies should be interred without anatomical examination. *Reg. v. Feist*, 18.

#### ARSON.

The prisoner wilfully set fire to goods, consisting of furniture and stock-in-trade, being in a house in his own occupation, with intent to defraud an insurance company. The house was not set on fire or burnt:

Held, that he was guilty of a felony under the 14 & 15 Vict. c. 19, s. 8; and that an indictment charging him with feloniously, &c., setting fire to certain goods of his, to wit, &c., being in a certain house, in the possession and occupation of the prisoner, with intent, &c., was sufficient. *Reg. v. Aaron Lyons*, 84.

#### ASSAULT.

An indictment contained counts charging an assault, and unlawfully and maliciously inflicting grievous bodily harm, and also a count for a common assault. At the trial evidence was given that the prisoner inflicted serious bodily injuries upon the prosecutor. The jury found the prisoner guilty of an aggravated assault without premeditation, and that it was done under the influence of passion:

Held, that the verdict was rightly entered on the record on the counts charging an assault and unlawfully and maliciously inflicting grievous bodily harm. *Reg. v. Henry Sparrow*, 393.

On an indictment for assault, it was proved that the offence was committed in one of the carriages of a train running from Brighton to New Cross, and before the train had arrived at the Three Bridges Station, in the County of Sussex. At that station the prosecutrix left the carriage in which she had been riding with the defendant, and rode in another carriage of the same train to New Cross, which is within the jurisdiction of the Central Criminal Court.

Held, that by the joint operation of the 7 Geo. 4, c. 64, s. 13, and the 4 & 5 Will. 4, c. 36, s. 2 (the Central Criminal Court Act), the indictment was properly preferred and tried at the Central Criminal Court. *Reg. v. French*, 252.

Upon an indictment for an assault upon a County Court bailiff in the execution of his duty, the production of a warrant of the County Court Judge for the apprehension of the prisoner, is a sufficient justification of the act of the bailiff in apprehending the prisoner, without proof of the previous proceedings authorising the warrant, even though the judgment be obtained in one county and the warrant sent for execution into a different county.

*Williams, J. dubitante. Reg. v. David Davies*, 486.

The master of an English vessel contracted with the Chilian Government to convey Chilian subjects from Valparaiso to Liverpool, and they were put on board under duress, and so conveyed against their will.

Held, assuming the master could justify what he did within the Chilian jurisdiction, yet, after the vessel passed out of it, he was guilty of a wrong amounting to a false imprisonment. *Reg. v. William Leslie*, 269.

Where a magistrate dismisses a complaint for assault on any of the grounds mentioned in 9 Geo. 4, c. 31, s. 27, he is not bound to grant the certificate given by the section

immediately, if not asked for. But if he does grant it immediately on being asked for it, though the application for it is not until some days after the hearing, that is a sufficient compliance with the section which says, "and shall forthwith make out a certificate," &c. *Coster v. Hetherington*, 175.

Where a magistrate dismisses a complaint for assault and battery on any of the three grounds mentioned in sect. 27 of 9 Geo. 4, c. 31, he is bound to grant the certificate provided by that section for the protection of the party accused.

He may grant it, though neither party be present at the time he grants it.

Where both parties had left the court after the hearing of the case, and in their absence, and without notice to them, the magistrate directed the clerk to make out the certificate before the next case was called on, which the clerk did, and a day or two after sent it to the party entitled to it :

Held, a sufficient compliance with 9 Geo. 4, c. 31, s. 27, which directs the magistrates "forthwith" to make out the certificate. *Hancock v. Somes*, 172.

See WOUNDING.

### BANKRUPTCY.

A bankrupt was indicted under the 12 & 13 Vict. c. 106, s. 252, for making a false and fraudulent entry in a book of account with intent to defraud his creditors. The jury found that he had made the false entry with intent to deceive his creditors, but not with intent to defraud them of any money or property, or in any way to prevent them recovering any part of his estate :

Held, that this was a mere concealment as to the mode of expenditure, and not done with intent to defraud the creditors of any property, it did not come within the 252nd section, but was properly cognisable under the 256th section, when the question of granting or withholding the certificate came before the commissioners.

### BRIBERY.

See ELECTION LAW.

### BODILY HARM.

See WOUNDING.

### COINING.

The prisoner, jointly with several others, was indicted for a felony, viz., for knowingly and feloniously having in their custody and

possession a mould (for coining) of the obverse side of a half-crown. The mould and other coining materials, and also all the persons charged, with the exception of the prisoner, were found and taken in a house occupied by the prisoner. At the time of the capture the police were attacked, and attempts were made to destroy the coining materials, and the prisoner came to the house, and entered the house, notwithstanding some of the others called out to him "that the police were there." He was then captured. It was also proved that the prisoner, about thirteen days before, had passed a bad half-crown, but it did not appear that that half-crown was made in the mould found in the house :

Held, that there was sufficient evidence to be left to the jury on the charge of felony, and that the evidence of the passing of the bad half-crown was admissible upon the trial of the felony to prove guilty knowledge. *Reg. v. Uriah Weeks*, 455.

### CONCEALMENT OF BIRTH.

On an indictment against the mother for the concealment of the birth of her illegitimate child, it appeared that the body of the child was found, three days after it was born, behind the door of the privy belonging to the house where she lived as domestic servant, in a tub covered over with a small cloth :

Held, that there was no conclusive evidence to warrant the jury in finding a verdict for concealment of birth. *Reg. v. Sarah Opie*, 332.

### CONSPIRACY.

On a general count for conspiracy, the defendant is entitled to particulars of the acts relied upon in support of the charge : but on a special count alleging overt acts, the court will not order particulars to be furnished, in the absence of an affidavit on the part of the defendant, that he has no knowledge of the overt acts charged, and does not possess sufficient information to enable him to meet them :

Quære, whether with such an affidavit, the defendant would be entitled to particulars. *Reg. v. Stapylton and others*; *Reg. v. Esdaile and others*; *Reg. v. Brown and others*, 69.

The prisoners were at a public-house in the same room with the prosecutor ; one of them placed a pencase on the table, and left the room to get writing paper. Whilst he was absent, one of the two who remained took the pen out of the case, and put a pin in its place. The two remaining prisoners then induced the prosecutor to bet the other

prisoner, when he returned, 50s., that there was no pen in the case. The prosecutor put his money down, and one of the prisoners snatched it up, to hold. The pence was then turned up into the prosecutor's hand, and another pen, with the pin, fell into his hand, and then the prisoners took the money:

Held, that the evidence was sufficient to support a count for conspiracy, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to cheat, &c.

Held, also that it was immaterial, that the prosecutor intended to cheat the prisoner with whom he betted, if he could. *Reg. v. Samuel Hudson, John Smith, and John Dewhirst*, 305.

### CORRUPT PRACTICES.

See ELECTION LAW.

### CRIMINAL INFORMATION.

This court will not grant a criminal information for breach of a public statute creating a state offence on the application of a private person, but only on the information of the law officers of the Crown.

If a private person desires to punish an infraction of such a statute he must do so by the ordinary machinery for the administration of justice, the preferring of an indictment.

The Foreign Enlistment Act creates an offence against the state, and the Court refused a rule for a criminal information for breach of it on the application of a private person without the sanction of the Attorney-General. *Ex parte Crawshaw v. Langley*, 356.

### CRUELTY TO ANIMALS.

The 12 & 13 Vict. c. 92, s. 3, enacts that every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other animal, shall be liable to a penalty not exceeding 5*l.* for every day, &c. And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, &c., cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence:

Held, that aiding or assisting at the fighting or baiting must occur at a place kept or used for the purpose, to constitute an offence under the above section. *Clark v. Hague*, 324.

### COUNTY COURT.

The prisoner had obtained a blank form (used in the County Courts Office for plaintiffs to fill in the particulars of the names, &c., as instructions for the issue of County Court summonses), which he filled up, and without authority signed it, "W. G., Registrar of the T. Court." On the back of it he wrote, "Unless the whole amount claimed by Mr. Alexander Richmond, Draper, of T., is paid on Saturday, an execution warrant will be immediately issued against you. Witness my signature, W. G." This document the prisoner enclosed in an envelope, and sent by post to a person who was indebted to him, and whose wife, in consequence of the receipt, went to W. G., the Registrar of the County Court, to pay the debt:

Held, that this was an acting, or professing to act, under false colour and pretence of process of the County Court, within the 9 & 10 Vict. c. 95, s. 57. *Reg. v. Richmond*, 200.

See ASSAULT.

### ELECTION LAW.

The 17 & 18 Vict. c. 102, s. 14 (the Corrupt Practices Prevention Act) enacts that no person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this act shall be committed, and unless such person shall be summoned or otherwise served with a writ or process within the same space of time.

Quere, whether this section applies to an information for a misdemeanor, and not for a penalty or forfeiture.

The defendant was indicted in the first count of an indictment for having paid a sum of money to A., with the intent that it should be expended in bribery at an election, and he was indicted in the other counts with having bribed different voters, when he was found guilty upon all the counts. The evidence was that he paid the money to W., who paid it to A., with the intent as stated in the first count, and that A., and not the defendant, personally bribed the different electors:

Held, that this was ground only for an application to the court at the trial that the prosecutor should be compelled to elect upon which of the charges he would proceed, that of having advanced money for the purpose

of bribery, or for each distinct act of bribery committed by the agent, he being liable as a principal to be found guilty of the misdemeanor committed by the hands of his agent. *Reg. v. Leatham*, 425.

If a confession of a crime be so obtained as to be inadmissible in evidence, yet if in the course of such confession a clue is given to other evidence which will prove the case, such latter evidence is admissible.

On an inquiry before Commissioners under the 15 & 16 Vict. c. 57, to examine as to corrupt practices at an election for a member of Parliament, a letter was produced, written by A., the party suspected of bribery, to his agent, in answer to one from the agent, asking for an account of sums advanced; this letter was produced by the agent. On an information being subsequently filed against A., this letter was called for and produced by the secretary to the Commissioners, in whose hands it had remained, and on the letter of the agent to which it was an answer being called for, and not being produced, secondary evidence of it was tendered and admitted:

Held, that such evidence was properly admitted, and that the provision in 15 & 16 Vict. c. 57, s. 8, "that no statement made by any person in answer to any question put by a commissioner, shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal, was not applicable, and did not prevent the admission of such evidence.

There is no appeal from the decision of this Court on a rule for a new trial of an information at the suit of the Attorney-General. *Reg. v. Leatham*, 498.

#### EMBEZZLEMENT.

The prosecutors, manure manufacturers, engaged the prisoner, who kept a refreshment house at B., to get orders, which were supplied from their stores at B. under the prisoner's control. The rent was paid by the prosecutors, and prisoner's duty was to collect money, and pay it over at once; he was also to send weekly accounts of sales and receipts. He was to be paid by commission, and was called agent for the B. district. After some time the prisoner signed a proposal to a guarantee society, which stated that his salary was 1*l.* per year besides commission, and it was proved that the prosecutors had agreed to give this salary of 1*l.* per year. The prisoner was allowed to get in arrear, and was treated as a debtor in respect of such arrears. Having fraudulently returned the names of three persons as

owing money to the prosecutors, when the prisoner in fact had received it and appropriated it to his own use, he was indicted for embezzlement:

Held, that he was not a servant within the 7 & 8 Geo. 4, c. 29, s. 47, and that he could not be convicted of embezzlement. *Reg. v. Walker*, 1.

The prisoner was the servant of an agent of a railway company, employed to deliver goods according to a delivery-book furnished by the company, and to account for the moneys to the clerk of the company. Having received, in the course of his duty, moneys "for the carriage due to the said railway company," and given receipts in the name of the railway company, he absconded without accounting to any one. The agent made good the deficiency to the company. The prisoner was indicted for embezzlement, and the moneys were laid to have been received by the prisoner on account of his master (the agent):

Held, that though the moneys were received in the name of the company, and receipts given accordingly, yet that they were received on account of his master (the agent). *Reg. v. Thorpe*, 29.

B., being in difficulties, assigned all his book debts, estate and effects to trustees for the benefit of creditors. He was employed by the trustees at a salary, to manage the business and collect the debts for them. He received the amount of two of the debts, and did not account for it:

Held, 1st. That he was not a clerk or servant within the meaning of the act.

2nd. That inasmuch as the debts, being chosen in action, could not be legally assigned, he had received only money which was in law, though not in equity, his own; and therefore, that he could not be guilty of embezzling it. *Reg. v. Barnes*, 129.

It was the assistant overseer's duty to collect the rates, and upon receipt to pay them into a bank to the account of the overseers, and then to obtain the overseers' receipts for sums so paid to their account; it was his duty also to enter the rates, when received by him, in a book. At the audit the accounts so entered by him were contrasted with the receipts given to him by the overseers. Just previous to an audit, the assistant overseer fraudulently obtained from the overseers receipts for sums, by stating that he had paid them into the bank to the overseers' account, when in truth he had not, having previously misappropriated them. He produced such receipts to the auditor, and deceived him as to his having handed the moneys over to the overseers:

Held, that he was properly convicted of embezzlement, and that the fact of entering the sums when received in his book did not alter the character of the offence. *Reg. v. Guelder*, 372.

The prisoner, the secretary of a money club, was directed by the club to sue upon a joint promissory note, the property of the club, or get better security, and the note was handed to him by W., the treasurer, who was not a member of the club, and who at the same time desired that his name should not be used in the legal proceedings. The prisoner indorsed W.'s name on the note, employed an attorney, who issued a writ, and in consequence of the action money was paid to the prisoner by one of the joint makers, which the prisoner fraudulently withheld from the club and appropriated.

The duties of the prisoner, according to the rules of the club, were duties cognate to that of receiving money for the club, but that duty was not expressly named in the rules:

Held (Crompton, J. *dubitante*), that the prisoner had received the money as servant for the use of the club, and that he was properly convicted of embezzlement:

Held, also (affirming *Spencer's* case, Russ. & Ry. 299), that the employment to receive money on this occasion was sufficient to constitute an employment within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47, though receiving money was not the prisoner's usual employment, and it was the only instance in which he was so employed. *Reg. v. James Tongue*, 386.

The prisoner was informed by letter from the prosecutors that for all business he did for them he would be allowed a commission. It was his duty to account to the prosecutors for any money he might receive for them immediately on the receipt of it:

Held, that upon this evidence, the prisoner was not shown to be a clerk or a servant within the 7 & 8 Geo. 4, c. 29, s. 47. *Reg. v. Philip William May*, 421.

Indictment charged the prisoner, who was a solicitor, with embezzlement. It appeared from his appointment, as entered in the minute book of the company, that he was a land agent to the company, and that in the course of his duties he collected the rents of houses, refreshment stalls, book stalls, &c., and should have paid the sums over to the company, and that he managed the parochial assessments, &c., as to the justness of claim, &c. His salary was 300*l.* a year, and an extra sum was allowed for travelling expenses:

Held, that he was a clerk or servant within

the meaning of the Act 7 & 8 Geo. 4, c. 29. *Reg. v. Gibson*, 436.

The fact of a commercial traveller, who was employed by the prosecutor, being paid by commission and being at liberty to obtain orders for others than the prosecutor, does not prevent him from being a servant to the prosecutor, liable to be indicted for embezzlement under the 7 & 8 Geo. 4, c. 29, s. 47. *Reg. v. James Tite*, 458.

An indictment charged the prisoner with having embezzled three sums of 2*l.*, the moneys of his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended the sums charged in the indictment were subjects of a mistake in the keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion:

Held, that such evidence was admissible.

*Reg. v. Richardson*, 448.

A. was indicted for embezzling H.'s goods, and for larceny of H.'s goods; B. for receiving goods, the property of H., knowing them to have been stolen. A. was found guilty of embezzling only, and B. for feloniously receiving:

Held, that the conviction of B. was right, for the 7 & 8 Geo. 4, c. 29, s. 47, enacts that every person who has embezzled within the meaning of that section "shall be deemed to have feloniously stolen from his master," and that being so, B.'s offence was properly described in the count for receiving. *Reg. v. Frampton*, 16.

See FALSE PRETENCES, LARCENY.

## EVIDENCE.

A deposition taken before the coroner on the inquest is admissible in evidence where the witness is so ill as to be unable to attend at the trial, in the same manner as a deposition taken before the magistrate. *Reg. v. Hazell*, 443.

A witness who had been examined before the magistrate, and whose deposition was returned, was, at the trial, said to be too ill to give evidence, though not too ill to be able to travel.

Deposition read, the Court being of opinion that the words of the statute, "so ill as not to be able to travel," were applicable to a case where the witness is so ill as not to be able to travel for the purpose of giving evidence. *Reg. v. Wilson and another*, 453.

Upon an indictment for feloniously using certain instruments upon the person of a woman, who afterwards died, with intent to procure a miscarriage, the dying declaration of the woman is inadmissible.

The rule laid down in *Mead's case* (2 Barn & Cres. 608), "that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration," recognised and adopted. *Reg. v. John Daubeney Hind*, 300. The prisoner was indicted for obtaining money from the trustees of a savings bank by falsely pretending that a document produced by the wife of D. had been filled up by D.'s authority; and in another count for conspiring with the wife of D. to cheat the Bank. D.'s wife presented the document, which had been fraudulently filled up at the instance of the prisoner, and obtained the money, and afterwards eloped with the prisoner. D.'s evidence was necessary to show that he had given no authority, but it was objected to on the ground that it implicated his wife:

Held, that D.'s evidence was admissible, as the wife was not charged upon the indictment.

Held, also, that the finding of the prisoner guilty on the first count for false pretences, was not inconsistent with his acquittal on the count for conspiracy. *Reg. v. Charles Halliday*, 298.

A witness was called on behalf of a prisoner; before the witness was sworn he professed an inability to speak English. No question was then raised on the fact by the counsel for the Crown, and accordingly the witness was sworn in Irish, and gave his evidence in that language through an interpreter. On cross-examination he was asked whether, on a recent occasion, he had not spoken in English to two persons who were present in court, and shown to witness. He denied the fact, and those two persons were called by the Crown to contradict the statement so made, and their statements were sent to the jury as evidence:

Held, that such evidence was inadmissible to show that the witness had made such a statement. *Reg. v. Burke*, 44.

A conversation between two persons in relation to the charge under investigation made in the presence of the prosecutrix, but in the absence of the prisoner, admitted. *Reg. v. Arnall*, 439.

A policeman and the prosecutor went into a room where the prisoners were, and the policeman charged one with stealing the prosecutor's hops, and the other with receiving them, knowing them to be stolen. A

third person in company with the prisoners, who was also at the same time charged by the policeman with the stealing, said to one of the prisoners, "Well, John, you had better tell Mr. W. (the prosecutor) the truth." Neither the prosecutor nor the policeman dissented or remarked upon this advice, whereupon the prisoner John made a statement in the nature of a confession:

Held, that this statement was admissible in evidence, the circumstances not being such as to exclude or protect it as a privileged communication. *Reg. v. John Parker and George Parker*, 465.

It is not the duty of constables of police to interrogate prisoners in their custody, even though they have first cautioned them not to criminate themselves. *Reg. v. John Hassett*, 511.

It is sufficient evidence of a previous summary conviction, to show that the certificate of conviction and the warrant agree, and that the prisoner was received into custody under the warrant, without further proving identity. *Reg. v. William Levy and another*, 73.

## FALSE IMPRISONMENT.

See ASSAULTS.

## FALSE PRETENCES.

A fraudulent misrepresentation of an existing fact, accompanied by a promise, *e. g.*, that the prisoner had bought skins at B. and wanted 4*l.* 10*s.* to fetch them home, and that he would bring the skins to prosecutor and sell them to him, and that they were worth 8*l.* or 9*l.*, is a sufficient false pretence within the 7 & 8 Geo. 4, c. 29, s. 53, upon which a prisoner may be convicted, although it appears that prosecutor advanced the 4*l.* 10*s.* on the faith that the prisoner had purchased the skins at B. and would bring them to him and sell them to him. *Reg. v. Charles West*, 12.

An indictment for obtaining money by false pretences, in the first count alleged that prisoner pretended to H. that he was the agent of J. B., and was sent to the pay-table, to receive certain moneys payable to J. B., and that he was authorised to receive such moneys on behalf of J. B., by means whereof, &c.

In a second count the false pretence was alleged to be, that the prisoner falsely pretended to one A. that he (the prisoner) was authorised to send him (A.) to the pay-table, to get the pay-table money of the aforesaid J. B., by means of which, &c., the prisoner obtained from H. certain money, with intent to defraud.

In a third count the false pretence was alleged to be, that the prisoner pretended to the said A., that he (prisoner) was the agent of J. B., and that he (the prisoner) was sent by J. B. to the pay-table, to receive certain moneys payable to J. B., and that he was authorised to receive such moneys on behalf of J. B., by means of which, &c., the prisoner obtained from A. certain moneys, with intent to defraud.

At the trial, A. proved that the prisoner sent him to the pay-table in these terms, "Go to the pay-table, and fetch J. B.'s money;" that he (A.) accordingly went, and said to H., "He wanted J. B.'s pay-table money;" whereupon H., without asking any question, gave the money due to J. B. to A., who took it to the prisoner:

Held, that this amounted to a false pretence by the prisoner "that A. was authorised to receive J. B.'s money," but was not evidence of the pretences charged in the indictment, that he, the prisoner, was authorised, &c., to receive J. B.'s money. *Reg. v. William Butcher*, 77.

A dog is not included in the term "chattels" in the 7 & 8 Geo. 4, c. 29, s. 53, and is not the subject of the misdemeanor of false pretences.

Such things only are included in that enactment as were the subjects of larceny at common law. *Reg. v. Robinson*, 115.

On the trial of an indictment for false pretences, it was proved that the defendant offered a chain in pledge to a pawnbroker, and required 35s. to be advanced upon it, representing that it was gold. On being tested it turned out to be a compound of brass, silver, and gold, but the gold was very minute in quantity:

Held, not a false pretence within the statute. *Reg. v. Oscar Lee and Joseph Lee*, 233.

The prisoner tendered, in 1859, a five-pound note of a bank which had long ago stopped payment and in 1852 paid a dividend, and obtained change to the full amount. At the close of the prosecution it was objected by counsel for the prisoner, that there was no proof of the allegation in the indictment, that the note was not good, or of the value of five pounds, or of any value. The judge told the jury that there was some evidence from which they might infer that the note was not of any value. The jury found the prisoner guilty:

Held, that the question was not properly left to the jury; that the question of value was an immaterial one, and that simply producing the note and leaving it to tell its own story did not constitute a false pretence,

and that therefore the conviction could not be sustained. *Reg. v. Charlotte Evans*, 257.

A wilful misrepresentation of a definite fact with intent to defraud, cognisable by the senses—as where a seller represents the quantity of coals to be fourteen cwt., whereas it is in fact only eight cwt., but so packed as to look more; or where the seller, by manœuvring, contrives to pass off fasters of cheese as if extracted from the cheese offered for sale, whereas it is not—is a false pretence indictable under the 7 & 8 Geo. 4, c. 29, s. 53. *Reg. v. Thomas Goss*, *Reg. v. Joseph Ragg*, 262.

Prisoner contracted with prosecutrix to make a mattress to be stuffed with wool at an agreed price. The mattress was sent, and paid for at the price agreed; but upon opening it shortly afterwards it was discovered that it contained 70lbs. weight of a very different and inferior material called flock, and only 20lbs. weight of wool.

Quære, whether an indictable false pretence. *Reg. v. Pratt*, 334.

An indictment for false pretences charged that the prisoner falsely pretended to the prosecutor that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him, the prisoner, about some carpet, and had asked him to procure a piece of woollen carpet, to wit, about twelve yards, by which, &c. Whereas no such person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of woollen carpet.

The evidence was, that the prisoner stated to the prosecutor that he wanted some carpeting for a family in a large house in the village, who had had a daughter lately married, and thereby obtained twenty yards of carpet from him.

The evidence to negative the false pretence was that of a lady living in the village whose daughter was married about a year ago, who stated that she had not sent the prisoner to the prosecutor for the carpet:

Held, that there was a sufficient false pretence alleged in the indictment, and that it was sufficiently negated by the evidence. *Reg. v. Burnsides*, 370.

The prisoner was charged with obtaining a specific sum from W. by false pretences. It appeared that he was employed by his master to take orders, but not to receive moneys, and he was proved to have obtained the specific sum from W. by representing that he was authorised by his master to receive it. Evidence was then admitted of the prisoner's having within a week from the above obtaining, obtained another sum



of money from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way :

Held, that such evidence was not admissible for the purpose of proving the intent of the prisoner when he committed the acts charged in the indictment. *Reg. v. Thomas Newall Holt*, 411.

See LARCENY.

## FOREIGN ENLISTMENT ACT.

See CRIMINAL INFORMATION.

## FORGERY.

Query—Is the signature to a post-office order, required to be made by the payee previously to the receipt of the money, the signing of a receipt or of an order. *Reg. v. Ansell*, 409.

The prosecutor, Borwick, sold powders called "Borwick's baking powders," and "Borwick's egg powders," wrapped up in printed papers. The prisoner procured 10,000 wrappers to be printed similar to Borwick's, except that the name of Borwick was omitted on the baking powders. In these wrappers the prisoner inclosed powders of his own, which he sold for Borwick's powders. The jury found that the wrappers so far resembled Borwick's, as to deceive persons of ordinary observation, and that they were procured and used by the prisoner with an intent to defraud :

Held, that the prisoner could not be convicted of forgery, though he was liable to be indicted for false pretences. *Reg. v. John Smith*, 32.

The prisoner for 2s. 6d. paid to him by a seaman, made a fac-simile of a genuine report of the character of a discharged seaman by a shipping master under 17 & 18 Vict. c. 104, s. 176, except that he substituted G., which signified "good," for M., which signified "middling," and delivered it to the seaman. It was found that this was done knowingly and fraudulently :

Held, to be an offence within sect. 176, which makes the forging or fraudulently altering any such certificate or report a misdemeanor. *Reg. v. Wilson*, 25.

## FRAUD.

The defendants were indicted under the 5 & 6 Vict. c. 39, s. 6, for having fraudulently and without the authority of their principals transferred and delivered a bill of lading of certain timber for their own benefit. At the close of the case for the prosecution, an examination of the defendants in the Court of Bankruptcy on the 26th of July, taken

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after their committal for trial on the present charge, was given in evidence on their behalf, and it was proved that such examination was compulsorily taken upon a summons duly issued by the Commissioner of Bankruptcy, at the instigation of the creditors. On the examination the defendants, in answer to questions put to them, gave a full detail of all the circumstances connected with the fraud alleged, and their evidence was substantially an admission of what had been deposed to against them on the hearing of the charge before the magistrate. It was contended on behalf of the defendants at the trial that the evidence given by them in the Court of Bankruptcy was a "disclosure" within the meaning of the proviso in the section of the statute above mentioned :

Held, 1st. That if this was a good defence, it was properly raised under the plea of not guilty.

2nd. Per Campbell, C.J., Pollock, C.B., Wightman, J., Martin, B., Willes, J., Bramwell, B., Watson, B., Channell, B., and Hill, J., that the evidence given before the Commissioner of Bankruptcy was not a "disclosure" within the meaning of the said proviso, all the facts having been well known before that time. Per Cockburn, C.J., Williams, J., Crompton, J., Crowder, J., and Byles, J., that such evidence was a "disclosure" within the meaning of the said proviso, and furnished a good defence to the indictment. *Reg. v. Skeen and Freeman*, 143.

## GAME.

See NIGHT POACHING.

## HAWKER.

The appellant, who lived at Knaresborough, sent drapery goods to Ripon for sale. A house was there taken by his agent, in which they were exposed for sale. The appellant not having a hawker's licence, an information was laid against him, and he was convicted, the justices being of opinion, notwithstanding the evidence (which they set out in the case), that he was not a householder or person having his usual place of abode in Ripon :

Held, that the evidence showed that he was a householder; and that notwithstanding he may not have been a *bond fide* householder, but had taken the house merely to avoid taking out a licence, yet he was still a householder, and not liable therefore to be convicted. *Houpe (appellant) v. Smith (respondent)*, 203.

## HIGHWAY.

Where the defendants retract their plea of "not guilty," and plead "guilty," the Court has no power to order the costs of the prosecutor, under sect. 95 of the Highways Act (5 & 6 Will. 4, c. 50), which directs such costs to be ordered by the Judges of Assize before whom such indictment is "tried."

Where the inhabitants of the parish are indicted for non-repair of a highway, and appear and plead not guilty by two surveyors, it is not competent to one of such surveyors only to appear and retract the plea of "not guilty" and plead "guilty;" the other appearing only and pleading by the clerk of his attorney. *Reg. v. The Inhabitants of Langley*, 366.

On the trial of an indictment for non-repair of a public carriage road, it appeared that the road was an ancient one, and that about eighteen years previously it was altered, by straightening and widening it under an award of Inclosure Commissioners. The parish had repaired the road, both before and after the award. No steps were taken by the commissioners for putting the road into complete repair (41 Geo. 3, c. 109, s. 9), and there never was any declaration by justices that the road had been fully and sufficiently formed and repaired:

Held, that a conviction against the parish for the non-repair of the road could not be sustained. *Reg. v. Inhabitants of East Hagbourne*, 135.

See NUISANCE—WAY (RIGHT OF).

## HOUSEBREAKING.

An indictment charging that the prisoner feloniously broke and entered a certain dwelling-house with intent feloniously to steal therein, and not with actually stealing, cannot be sustained, the felony created by the statute being entering and stealing.

An opening of a door in a shop under the same roof where the prisoner lived as servant, for the purpose of committing a felony, is a breaking and entering within the statute. *Reg. v. Wenmuth*, 348.

## HUSBAND AND WIFE.

See EVIDENCE—LARCENY—RECEIVING—WOUNDING.

## INCLOSURE ACT.

See HIGHWAY.

## INDICTMENT.

See EMBEZZLEMENT—EVIDENCE—FALSE PRETENCES—MURDER—PERJURY—PRACTICE.

## JURY.

See PRACTICE.

## LARCENY.

## BAILEE.

The prisoner was a trustee of a friendly society (a lodge of Odd Fellows), and appointed, by resolution of the society, to receive money from the treasurer and carry it to the bank. He received the money, but, instead of taking it to the bank, he applied it to his own purposes. He was indicted as a bailee of the moneys of the treasurer R. C., feloniously converting the money to his own use; and also for a common law larceny of the money of R. C.

The Friendly Societies Act, 18 & 19 Vict. c. 63, s. 18, vests the property of such societies in the trustees, and directs the property to be laid in the names of the trustees in indictments:

Held, that the prisoner could not be convicted of feloniously converting or stealing the moneys of R. C. as charged in the indictment. *Reg. v. Francis Loose*, 302.

The acting treasurer of a charity misappropriated moneys of the charity received by him as such. Being indicted for larceny as a bailee, under sect. 4, of 20 & 21 Vict. c. 54, it was

Held, that the money was not held by him as bailee, for he was not bound to pay over the specific coins; and that it was not larceny, the first possession being lawful. *Reg. v. Garrett*, 368.

Where husband and wife were jointly indicted for larceny under the baillie clause, and it was proved that they took charge of the property, but the wife alone disposed of it afterwards:

Held, that neither could be convicted: the wife, because she could not be a bailee; the husband, because he was not proved to have taken part in the conversion. *Reg. v. Denmour and Wife*, 440.

A treasurer of a money-club received small weekly payments from each member, and had authority, with the secretary's consent, to lend the club money to members. There was a periodical division of the funds and profits among the members:

Held, that the treasurer could not be in-

dicted as a fraudulent baillie under the 4th section of 20 & 21 Vict. c. 54, for larceny of moneys paid in by a member. *Reg. v. Joshua Hassall*, 491.

Indictment charged the prisoner with obtaining 26l. 5s., the moneys of John Hackblock, by false pretences. According to the prosecutor's evidence he was induced to part with the money on the prisoner's statement that he was to pay 135l. for a pair of carriage horses. No such averment was contained in the indictment.

It was then urged that the prisoner might be convicted of larceny as a baillie; but the money having been obtained by fraud, and the prosecutor having parted with all control over it as well as with the possession:

Held, there was no bailment, and that prisoner could not be convicted. *Reg. v. Hunt*, 495.

#### BY FINDING.

A finder of lost property is not guilty of larceny in appropriating it to his own use, unless he had, at the time of finding, a felonious intent.

Where a prisoner was found guilty of larceny, for appropriating property which he had found to his own use, on the direction of the judge, that the felonious intent might be inferred from the subsequent, as well as the immediate acts of the prisoner—such as, after having heard the public crier announce the loss, taking no steps to restore the property to its owner, but appropriating it to his own use—it was

Held, that the direction was erroneous, and the conviction was quashed, because it was consistent therewith that the felonious intention did not exist at the time of finding. *Reg. v. Darius Christopher*, 91.

The prosecutor went into the prisoner's shop to have his hair cut, and he also made a purchase. His purse, containing notes and gold, was in a coat, which was laid on a chair while his hair was being cut: he made the payment from the purse, and then left the shop, and next morning he missed a 10l. note from his purse. The jury found that the note was dropped by the prosecutor in the shop, and that the prisoner found it, and that at the time he picked it up, the prisoner did not know, nor had he reasonable means of knowing, who the owner was, but that he afterwards acquired knowledge of who the owner was, and after that converted the note to his own use; that the prisoner intended, when he picked up the note, in the shop, to take it to his own use, and deprive the owner of it, whoever that owner might be, and that the prisoner believed at the

time he picked up the note that the owner could be found:

Held, that upon this finding the prisoner was guilty of larceny. *Reg. v. Henry Moore*, 416.

#### BY FRAUD.

The prisoner, a broker, having large dealings with the prosecutors, Russian merchants, in October entered into a contract for the purchase of 343 casks of tallow, which were expected to arrive by the *Hesper* in the ordinary course of trade. The tallow arrived accordingly on the 5th of December, and in due course the transaction should have been completed within fourteen days, and notice was given to prisoner of the arrival of the tallow, and he was called upon to complete the bargain. He requested that the tallow might be allowed to remain in the docks for a short time. This was granted. On January 28th, the manager for the prosecutors called on him and insisted on the completion of the contract, and the prisoner said he would pay for the tallow on the following day. On the next day the prisoner sent his clerk to the prosecutor's counting-house and obtained delivery orders for the tallow, and tendered to prosecutors a crossed cheque on the Bank of London for 8,781l. 8s. 9d., which was the price of the tallow. Immediately on obtaining possession of the delivery orders, prisoner sent them to the docks and transferred the property into fresh warrants, and when the cheque was presented there were no assets:

Held, not to be a larceny of the delivery orders by a trick; but a lawful possession of them obtained by reason of the prosecutors giving to the prisoner credit in respect of the crossed cheque. *Reg. v. North*, 433.

Prisoner went to a colliery professedly to buy a load of the best soft coal; the cart was accordingly loaded by the prosecutor's servant with that description of coal. It was the prisoner's duty then to have gone with the cart to the weighing machine and had it weighed, and then to have paid the weighing clerk for it. He, however, previously to going to the weighing machine, covered over the top of the coal in the cart with a very inferior description of coal called "slack," and then went with the cart to the weighing machine and told the weighing clerk that he had got "slack;" the clerk weighed the cart and charged for it as containing "slack" only. The prisoner paid for the coal as "slack," and left the colliery:

Held, that the property in the soft coal had not been parted with, and that the

prisoner could be convicted of larceny. *Reg. v. James Bramley*, 468.

#### INDICTMENT.

A count in an indictment charged the prisoners with stealing "lead fixed to a certain wharf." The evidence showed that the lead stolen formed part of the gutters of two sheds, constructed of bricks, timber and tiles on the wharf:

Held, that the word "wharf" was sufficient to comprehend the sheds, and that the prisoners might properly be convicted under the 7 & 8 Geo 4, c. 29, s. 44, on this count. *Reg. v. Rice and three others*, 119.

Iron found in the bed of a canal during the course of cleansing was returned by the canal company to the true owners, if capable of being identified; otherwise it was kept by the canal company:

Held, that in an indictment against a stranger for larceny of such iron, the property was properly laid in the canal company. *Reg. v. William Rowe*, 139.

In an indictment for larceny the property was laid to be in J. C. G., the manager of the Dudley and West Bromwich Bank. The property belonged to the banking company, a joint-stock company consisting of more than twenty partners, but no registration of it or appointment of any manager or public officer was proved. The indictment was amended at the trial, by laying the property in P. W. and others, P. W. being one of the partners:

Held, that the ownership, as amended, was rightly laid under 7 Geo. 4, c. 64, s. 14, and that it need not have been laid in the public officer (presuming there to have been one), under 7 Geo. 4, c. 46, s. 9. *Reg. v. Owen Pritchard*, 461.

Proof by an agent, of the receipt of rents, of letting the premises, ordering the repairs and managing the property generally on account of A. B., is sufficient evidence of title in A. B., without producing the title-deeds, upon a count in an indictment for stealing lead, the property of A. B. fixed to a dwelling-house of the said A. B. *Reg. v. George Brummitt*, 413.

It is no objection to an indictment that a previous conviction is stated at the beginning instead of, as usual, at the end of it.

Wherever it is stated, the proper practice is not to charge the jury to inquire into it, until the new charge is disposed of.

The judge directed the jury that if they did not think from the evidence that the prisoner was participating in the actual theft, it was open to them on the facts to find a verdict of receiving:

Held, that the direction was quite right, as the facts were consistent with either charge, and the prisoner was charged in one count with larceny and in the other with feloniously receiving. *Reg. v. Hilton and McEvin*, 87.

#### BY SERVANT.

The prisoner (a miller's foreman at weekly wages) was bound in the course of his duty to enter sales in a double cheque-book, to give the customer a copy of the entry, and retain the counterfoil for his master's inspection, and to enter in a cash-book receipts and payments, immediately upon their being made. There was a settlement of these books and accounts with his master, every Saturday night. On two occasions the prisoner received orders for goods, which were delivered and the money received by him, and cheques given by the prisoner to the purchaser, not from the regular book, and no entries were made of the sales in the regular cheque-book or the cash-book:

Held, that there having been complete sales of the goods, an indictment for larceny of them could not be sustained against the prisoner. *Reg. v. Betts*, 140.

#### POSSESSION.

Prisoner was indicted for sheep stealing. The prosecutor lost a sheep in September; it was found in the prisoner's possession in March following. There was no other evidence of larceny than the possession:

Held, that the period between the loss and the finding was too long to permit the case to go to the jury. *Reg. v. Harris*, 333.

#### BY WIFE.

A., being about to elope with B.'s wife, engaged a porter to bring his cart to the husband's house, which he did: and A. then assisted the wife in packing up the husband's property, and placing it in the cart. A., the wife, and her three children then went away with the things to a distant place, where the wife took lodgings in her own name, and afterwards A. and the wife being found living there, A. was charged with stealing the things:

Held, that it was a proper direction to the jury to tell them that, if they were satisfied that A. and the wife, when they so took the property, went away together for the purpose of having, and afterwards had, adulterous intercourse, they ought to find the prisoner guilty; but that if they believed that they did not go away with any such purpose, and had not committed adultery together, the

prisoner was entitled to an acquittal. *Reg. v. William Berry*, 117.

A. and B., relatives (uncle and cousin) of the wife, assisted the wife in packing and removing the husband's goods, the wife intending to leave the husband's dwelling and not intending to return to him. There was no evidence that the wife had committed adultery with either of the prisoners, or intended to do so. The jury found that the prisoners took the goods without the knowledge or consent of the husband, but with the intent to deprive him of the property in them:

Held, that the conviction could not be sustained, as it had not been left to the jury to say whether the prisoners took the goods at the time *animo furandi*, as principals, or whether they were merely assisting the wife to carry off the husband's goods. *Reg. v. Avery and another*, 184.

See EMBEZZLEMENT — FALSE PRETENCES — HOUSEBREAKING — INDICTMENT—ROBBERY.

#### LOTTERY.

By the 10 & 11 Will. 3, c. 17, s. 1, lotteries are declared common and public nuisances. Sect. 2, which came into operation on a subsequent day, rendered persons keeping lotteries liable to a penalty, to be sued for by information or action. The 42 Geo. 3, c. 119, contained similar enactments:

Held, that the keeping a lottery was an indictable offence.

The defendant kept an eating-house, exhibited placards headed "Great Eastern Money Club," "White's Race Club for the Radcliffe Cup," "White's South Union Weekly Money Club," and others similar, and sold tickets in respect thereof. Prizes were drawn and the holders of the tickets whose numbers were drawn for prizes received the same, and the defendant delivered out the prizes to such ticket-holders, but there was no evidence to connect the defendant with any drawing by lottery or otherwise for the prizes:

Held, that this evidence was sufficient to support a conviction against the defendant of keeping a lottery, but not sufficient to support a charge of keeping a house for betting upon horse-racing, under the 16 & 17 Vict. c. 119.

The jury returned a verdict of guilty, but recommended the prisoner to mercy, on the ground that perhaps he did not know that he was acting contrary to law:

Held, that the conviction was not invalidated by the addition to the verdict. *Reg. v. James Crawshaw*, 375.

#### MANSLAUGHTER.

The prisoner had for years been accustomed to keep fireworks in a house in London for sale, and a part of the process of manufacture of some of them was performed in the house, and by the supposed negligence of one of his servants an ignition of red and blue fire was caused, which communicated to the other fireworks, and a rocket shot across the street and set a house on the opposite side on fire, by which the death of S. W. was caused:

Held, that the prisoner was not liable to be indicted for manslaughter, as the unlawful act of keeping the fireworks was disconnected with the supposed negligence of the servant, which was the proximate cause of the death. *Reg. v. Wm. Bennett*, 74.

#### MASTER AND SERVANT.

See EMBEZZLEMENT—LARCENY—WORKMAN.

#### MURDER.

The prisoner was tried in 1858, for the murder of M. C. in 1857. In 1856, M. C. had sworn informations against the prisoner for rape. It was proved at the trial that the informations were sworn by her, and subscribed by her in the presence of prisoner, and that then a recognizance was executed for the prisoner to appear at the Assizes, 1856. The prisoner married M. C. before the Assizes, and consequently the charge was not proceeded with. At the trial in 1858, the informations so sworn, and the recognizances, were offered in evidence by the Crown. The judge received them, telling the jury that they were to regard them, not as evidence of the truth or falsehood of the charge so made, but as evidence of the fact of a charge having been so made; and that the facts evinced by the mere existence of those documents might be taken into their consideration upon the question of the existence of a motive:

Held, that the documents were properly admitted in evidence for that purpose. *Reg. v. Lydane*, 38.

Six men assaulted another man. In the course of the assault one of them inflicted a stab and killed the person assaulted. They were jointly indicted for murder.

The judge instructed the jury:—

1st. That the man who stabbed was guilty of murder, whether he intended to kill or not.

2nd. That the other five would be guilty of murder if they participated in a common design to kill.

3rd. If there was no common design to

kill, if the knife was used in pursuance of a common design to use it, they would all be guilty of murder.

4th. If there was no common design to use the knife, if being present at the moment of stabbing, they assented, and manifested their assent by assisting in the offence, they were guilty of murder.

5th. If neither of the last three modes of putting the case be proved against the five, they must find the stabber guilty, and acquit the rest.

6th. If they cannot ascertain which of them stabbed, they must acquit all. *Reg. v. Price and others*, 96.

On an indictment against the prisoner for murdering A. J. evidence is not admissible that three others in the same family died of similar poison, and that the prisoner was present at all the deaths, and administered "something" to two of these patients. *Reg. v. Thomas Winslow*, 397.

The evidence of a witness relative to a material conversation with a prisoner when in custody, ought not to be stated in the opening speech of the counsel for the prosecution; as the evidence may possibly be inadmissible when subsequently tendered arising from the circumstances under which the conversation took place. *Reg. v. Nicholas Creau*, 509.

Where the object of the Crown is to supply a motive for the commission of the offence, service of a notice to quit upon the servant of the prisoner is not sufficient to bring home knowledge to the prisoner so as to supply that motive. *Same Case*.

#### NAVAL STORES.

On an indictment charging the defendant, under the 9 & 10 Will. 3, c. 41, s. 2, with being in possession of naval stores marked with the broad arrow, it is necessary to show not only that the defendant was possessed of the articles, but also that he knew they were marked with the broad arrow. *Reg. v. A. H. Cohen*, 41.

Bags marked M, with their contents, addressed to G., an officer of the railway company at Nine Elms, were taken by two females to the Portsmouth station, and duly forwarded to London by railway, and deposited in the goods department of the railway at Nine Elms, London, where G. acted as officer. The prisoner, a marine store dealer at Portsmouth, wrote and telegraphed to such officer of the railway company to deliver the bags to Mr. Emmanuel. This was not done. But a letter written by G., stating "There are several bags lying at this station, consigned

by you to me, marked M.; to whom are they to be delivered?" was shown to the prisoner by a clerk in the railway office. The prisoner, in reply, directed the clerk to telegraph to deliver to Emmanuel, as before. The bags, in consequence of information, were opened at the goods department, and were found to contain naval stores marked with the broad arrow. Bags had been previously forwarded in a similar manner by the railway to their goods department in London marked E, which the prisoner had directed to be delivered to Mr. Emmanuel:

Held, that there was evidence to support a conviction against the prisoner for having in his custody, possession and keeping naval stores marked with the broad arrow, contrary to the 9 & 10 Will. 3, c. 41, s. 2. *Reg. v. J. S. Sunley*, 179.

On an indictment charging the defendant under the 9 & 10 Will. 3, c. 41, s. 2, with being in possession of naval stores marked with the broad arrow, it is necessary for the prosecution to show affirmatively a possession by the defendant with knowledge that they were marked with the broad arrow.

But such knowledge may be presumed from the circumstances attending the possession. *Reg. v. William Sleep*, 472.

#### NIGHT POACHING.

Prisoner was indicted for night poaching, unlawfully entering land by night to the number of three or more, for the purpose of taking, &c. The keepers were watching tame pheasants shut up in coops, when the prisoner with others entered. He was arrested and indicted under 9 Geo. 4, c. 69, s. 9:

Held, that pheasants under the control or care of a hen were not game, but might be subjects of larceny: also that a second count, for assaulting, &c., whilst in pursuit of game, could not be sustained. *Reg. v. Garnham*, 451.

An indictment alleged that A., on, &c., at, &c., was duly convicted before three justices, for that he within six months, on, &c., by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise—that is to say, about the hour of five o'clock of the night, &c., did by night then and there unlawfully enter a certain close of land, situate, &c., with a gun, for the purpose of then and there taking and destroying game, contrary, &c., and that he was thereupon then and there adjudged, the same being a first offence, to be imprisoned, &c., for three calendar months, &c. That the said A. afterwards, on, &c., at, &c., was convicted before two justices, for that he within, &c., on, &c., in the night

of the same day, &c., by night, unlawfully did enter on certain inclosed land, &c., with certain instruments for the purpose of killing, taking and destroying game thereon; this being his second offence, contrary, &c., and the said A. was then and there adjudged to be imprisoned, &c., for six calendar months, &c., and at the expiration of that period to enter into a recognizance not to offend so again for two years. That the said A. afterwards, and after he had been twice convicted as aforesaid, within, &c., on, &c., by night, to wit, about the hour of two o'clock in the night did unlawfully enter certain inclosed land, &c., for the purpose by night of therein taking and destroying game, &c.:

Held, that the first and second convictions were sufficiently shown to justify a conviction and prolonged sentence of imprisonment as for a third offence, under 9 Geo. 4, c. 69, s. 1, and that the other averments in the indictment were sufficient to sustain the conviction. *George Cureton v. The Queen*, 481.

Prisoners were indicted for night poaching, and for assaulting, a gamekeeper with intent:

Held, that evidence of the common intent to poach did not sustain the allegation of a common intent to wound.

It was proved that prisoners were seen upon the land of the prosecutor at night in pursuit of game. They escaped into a highway and there assaulted the keepers. But the keepers stated that they had not followed the prisoners into the highway with an intention to arrest them there.

Held, that there being no intention on the part of the keepers to arrest the prisoners at the time when the attack was made upon them, it was not an assault within the Night Poaching Act. *Reg. v. Doddridge and others*, 335.

#### NUISANCE.

Town commissioners empowered by statute to light the public streets with gas, and to break up the footways and carriageways for laying down the gas-pipes, and to enter into contracts with other companies to execute such works, cannot confer on a private gas company not having any parliamentary powers, authority to break up the footways or carriageways for the purpose of laying down service pipes from private houses, and connecting them with the main pipes.

A householder who gives directions to have such works done for the purpose of lighting his house with gas, is liable to be convicted as a principal giving orders to commit a

nuisance. *Reg. v. The Longton Gas Company*, 317.

Upon the trial of an indictment for a nuisance at common law, in carrying on the process of reburning animal charcoal, in the course of a sugar refiner's business, a summary conviction under 16 & 17 Vict. c. 128, s. 1, for carrying on the same trade, so as to occasion noxious effluvia, without using the best practicable means for preventing or counteracting the smoke or other annoyance, was tendered and received in evidence:

Held, inadmissible. *Reg. v. Fairrie*, 66.

#### PARENT AND CHILD.

See ABDUCTION.

#### PERJURY.

A summons, after the birth of a child, under 7 & 8 Vict. c. 101, s. 2, against the putative father, was issued on the personal application of the mother of the bastard child, not upon oath.

Semble, that before the summons issued there should have been evidence on oath of payment of money for the maintenance of the child by the putative father.

The putative father appeared to the summons, and defended the case on the merits, without objecting that the summons had issued on the statement of the woman, not on oath:

Held (*Martin, B. dissentiente*), that the putative father could not afterwards raise the objection:

Held, also (*Martin, B. dissentiente*), that he was liable to be indicted for perjury committed by him on the hearing of the summons:

Held, also (*per totam curiam*), that evidence of payment of money by the putative father within twelve months of the birth of the child, being evidence of the paternity, was a material fact on the hearing of the summons. *Reg. v. James Berry*, 121.

A summons after the birth of a bastard child, under 7 & 8 Vict. c. 101, s. 2, against the putative father, which issued on the application of the mother, was regular on the face of it, and alleged that proof had been given of payment of money by the father, within the twelve months after the birth of the child, for its maintenance. The father appeared to answer the summons at the petty sessions, and made no objection to the jurisdiction of the justices or otherwise, but was sworn on his own behalf, and gave evidence in respect of which he was after-

wards indicted for perjury. On the trial of the indictment for perjury, the jury found the defendant guilty, and found also that the defendant had not within the twelve months next after the birth of the child paid any money for its maintenance :

Held, on the authority of *Reg. v. James Berry* (8 Cox Crim. Cas. 121), that the justices at the petty sessions had jurisdiction to hear the summons, and that the defendant had waived the objection, the summons to the putative father to appear at the petty sessions being matter of process only, and not of substance essential to the jurisdiction of the petty sessions. *Reg. v. Simmonds*, 190.

The defendant was indicted for perjury committed before the Insolvent Court. The indictment alleged that he was a trader, whose debts amounted to less than 300*l.* : that he had resided six months within the jurisdiction; that he petitioned the court; that notice was given thereof to the creditors in the *Gazette*, and that a day for hearing was duly appointed and adjourned, and that on such adjourned day he falsely swore, &c.

Held, that the defendant's petition alleging that he was a trader owing less than the sum of 300*l.* was sufficient evidence of the last-mentioned facts:

Held, also, that the Insolvent Court, being a court of record, proof of the filing of the petition is sufficient to warrant the presumption that the sittings of the court are lawfully holden; and that, therefore, it is unnecessary to give specific evidence that notice of the petition was given to the creditors, or inserted in the *Gazette*, and that a day for the hearing had been duly appointed and duly adjourned.

An averment in the indictment, that the insolvent filed his petition "to wit, on the 20th day of May, 1859," is sufficient to show that he filed it after the passing of the statute, 10 & 11 Vict. c. 102, for the court will take judicial notice of the time at which a statute was passed.

A judge on the trial of an indictment for perjury has power to amend the description of an Act of Parliament named in the indictment.

Where the statute is mentioned in the indictment for the mere purpose of alleging that the offence was committed after its passing, and the alleged date of the offence is subsequent to such passing, the reference to the statute may be rejected altogether.

Semble, that where the title of an act of Parliament is inaccurately described, and the inaccuracy is so trifling that the court cannot fail to know with certainty what act is meant,

the variance is immaterial. *Reg. v. Westley*, 244.

It is not necessary expressly to aver materiality in any indictment for perjury. It will be sufficient if materiality is clearly disclosed by the facts as stated on the face of the indictment.

If materiality is not sufficiently averred, or apparent, the defect is not cured by the provisions of 14 & 15 Vict. c. 100, s. 20.

Nor is it such a defect as the judge will amend under the provisions of sect. 25 of the same statute. *Reg. v. Harvey*, 99.

An indictment for perjury stated that a cause was pending in a County Court, &c., and that on the hearing of the cause it became and was a material question, whether the plaintiff had, in the presence of the prisoner, signed at the foot of a certain bill of account between a certain firm, called Bridges and Co. and W., a receipt for payment of the amount of the said bill, and that the prisoner falsely, &c., swore that he, the said plaintiff, did on a certain day, in the presence of the prisoner, sign the said receipt (meaning a receipt at the foot of the said first mentioned bill of account) for the payment of the amount of the said bill :

Held, that the indictment was sufficiently certain, although it appeared that the plaintiff had signed many similar receipts in presence of the prisoner. *Reg. v. Harriet Webster*, 187.

It is not necessary that the evidence, produced to corroborate the first witness as to an assignment of perjury, should amount to a direct contradiction of the statement made by the prisoner, upon which the perjury was assigned.

Where, therefore, the alleged perjury was that the prisoner swore that a certain promissory note was not in his handwriting, and one witness having sworn that he saw the prisoner write the note, a second witness was produced, and in corroboration stated that the prisoner said at a subsequent meeting "that he could prove the note," although at the time there was none before him.

Held to be sufficient. *Reg. v. Towey*, 328.

The prisoner, a policeman, on the hearing of an information laid by him against a publican for keeping his house open after lawful hours, swore that he knew nothing of the matter except what he had been told, and that he did not see any person leave the house after eleven on the night in question.

Perjury was assigned on the last allegation, and to prove the falsity it was proved that several persons did leave the house



after eleven, and the magistrates's clerk who took the information proved that the prisoner on laying it said, that he had caught the publican, and that he had seen four men leave his house after eleven on the night in question, mentioning one of the four by name, he being one of those shown to have left that night after eleven. Two other witnesses proved that the prisoner made similar statements to them. It was also proved that the defendant, on the hearing of the information, had acknowledged that he offered to smash the case for 30s. And other evidence was given, showing that the prisoner had intended to get, and did get, money from the publican to settle the case :

Held, that this was sufficient confirmatory evidence to support a conviction. *Reg. v. Walter Hook*, 5.

Although it is not now necessary that the alleged perjury should be proved by two witnesses in contradiction of the prisoner, it is still requisite that the perjury should be proved by something more than the mere contradictory oath of the prosecutor. He must be corroborated by some independent testimony.

Where, therefore, the alleged perjury was, that the prisoner had sworn that he had paid certain sums of money on certain days, and that he had never said that certain packages contained a certain sum of money, and he was contradicted only by the denial of the prosecutor :

It was held (after consultation with Hill, J.), that there was not evidence to go to the jury. *Reg. v. Braithwaite*, 254.

Prisoner was indicted for wilful and corrupt perjury committed at the Westminster police court. A summons was granted upon an information, and upon the hearing of the summons the perjury assigned was committed. At the trial the information was produced, but not the summons :

Held, not sufficient. The summons should have been produced. *Reg. v. J. Whybrow*, 438.

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See NIGHT POACHING.

#### POST OFFICE.

See FORGERY.

#### PRACTICE.

##### CONVICT (PROPERTY OF).

Certain Turkish bonds were found in possession of a prisoner convicted of felony, and it appeared that one-sixth of the value thereof was purchased from the proceeds of the property stolen from the prosecutors and mentioned in the indictment, and the residue of the value thereof was held by the prisoner as trustee for K. The judge made an order directing the bonds to be delivered up to the prosecutors, and empowering them to retain one-sixth of the value, and to settle the residue upon trust for K., in such manner as she might advise.

Held, that the order was bad as to so much of the property as was not the subject of the indictment. *Reg. v. Pierce, Burgess, and Tester*, 344.

The prisoners, W. and B., were convicted of stealing 159 pieces of plush, the goods of De Gilley. Hart, before the prisoners were convicted, acquired a title to the goods by making an advance of 1,200*l.* *bona fide* to W., who was the servant and agent of De Gilley, and had established his title to the goods upon an action of trover brought against him for their recovery by De Gilley :

Held, that notwithstanding the title had been acquired under 5 & 6 Vict. c. 39, by Hart, the goods on conviction of the prisoners re-vested in De Gilley, and the Court ordered them to be restored under 7 & 8 Geo. 4. c. 29, s. 57.

This order was not obeyed, and a rule was obtained calling on Hart to show cause why he should not be attached for contempt, and a cross rule was obtained calling upon the prosecutor to show cause why the order of restitution made should not be rescinded.

Rule for an attachment made absolute. *Reg. v. Wollez and Bliss ; In re Solomon Abraham Hart*, 337.

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Held, on the authority of *Reg. v. James Berry* (8 Cox Crim. Cas. 121), that the justices at the petty sessions had jurisdiction to hear the summons, and that the defendant had waived the objection, the summons to the putative father to appear at the petty sessions being matter of process only, and not of substance essential to the jurisdiction of the petty sessions. *Reg. v. Simmonds*, 190.

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Held, that the defendant's petition alleging that he was a trader owing less than the sum of 300*l.* was sufficient evidence of the last-mentioned facts :

Held, also, that the Insolvent Court, being a court of record, proof of the filing of the petition is sufficient to warrant the presumption that the sittings of the court are lawfully holden ; and that, therefore, it is unnecessary to give specific evidence that notice of the petition was given to the creditors, or inserted in the *Gazette*, and that a day for the hearing had been duly appointed and duly adjourned.

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Held, that notwithstanding the title had been acquired under 5 & 6 Vict. c. 39, by Hart, the goods on conviction of the prisoners re-vested in De Gilley, and the Court ordered them to be restored under 7 & 8 Geo. 4. c. 29, s. 57.

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### CORONER'S INQUISITION.

Where it *primâ facie* appears to this court that a fair and impartial trial cannot be had in a particular place, and such is not displaced

by a strong case in answer thereto, the court will grant a *certiorari* to remove the proceedings into the Queen's Bench to enable an application to be made to have such case tried in some other jurisdiction. *Reg. v. Edward Gonne Bell*, 287.

#### EXPENSES OF PROSECUTION.

The court has no power to order payment, as part of the expenses of the prosecution, of the costs incurred by the warders of Millbank, in bringing down to Wells a prisoner in custody at Millbank, as an escaped convict, to be tried at Wells on a charge of larceny from the person. *Reg. v. Waters*, 350.

#### JURY.

In a presentment for maliciously killing sheep, the words, "made away with," were added to the words mentioned in the act :

Held, that these words "made away with" were surplusage, and did not vitiate the presentment. *In re Hunter*, 352.

Held, that the court has jurisdiction, under the 6 & 7 Will. 4, c. 116, s. 134, and 20 & 21 Vict. c. 16, s. 18, to respite to a subsequent assizes the hearing of a traverse of an award by the Turnpikes Abolition Commissioner. *In re the Dundalk, Carrickmacross, and Castleblaney Turnpike Trusts, and the Turnpikes (Ireland) Abolition Act*, 294.

An action for penalties under the Corrupt Practices Prevention Act;

Held, to be a case in which an application for a special jury under the late practice ought to be granted. *Lester v. Fegan*, 291.

Where a presentment for the raising of public money for the purpose of building a bridge has passed the grand jury in the usual way, and afterwards been acted on, and some of the money actually raised thereunder, a motion for a writ of *certiorari* to remove such presentment into this court to have same quashed, at the instance of a party who has traversed for damages, but has withdrawn that proceeding and has acquiesced for some time, will be refused. *In the Matter of the Trustees of the Will of John C. Kearney, deceased, acting for and on behalf of Thomas C. Kearney, an Infant, and a certain Presentment passed by the Grand Jury of the County of Cork, at the Summer Assizes*, 1858, 218.

Discharge of jury at a former trial no bar to a second trial, although the cause of discharge of jury does not appear upon the record, and they were not discharged from any real necessity.

Prisoner, W. D., was indicted for an indecent assault upon A. D. Upon his trial

at the Middlesex Sessions, before Mr. Payne, Deputy-Assistant Judge, the jury, not being able to agree upon their verdict, were, after being locked up five hours, discharged from giving a verdict, the prisoner being admitted to bail to appear and take his trial at the next session ensuing. In the meantime a writ of *certiorari* was lodged, and the prisoner surrendered to take his trial at the Central Criminal Court. It was objected, upon his arraignment there, that the prisoner could not be tried again, the judge having discharged the jury from giving their verdict of his own caprice, and not from any illness of any of the jurors, or any real necessity having arisen for their discharge. It was further objected that upon a jury being discharged the cause for such discharge should appear upon the record, and that this record was in that particular defective :

Held, that the judge presiding at the trial was sole judge as to whether a necessity for such a proceeding as discharging the jury had arisen, that a discretionary power was vested in him, that he must exercise his discretion, and that there was no appeal to any other tribunal as to whether in exercising that discretion he had done so rightly. *Reg. v. Davison*, 360.

#### PRISONER.

On the trial of an indictment for forgery against two prisoners, one of them, after the opening speech for the prosecution, asked to be allowed to withdraw his plea of not guilty, and to plead guilty. This was done, and the plea of guilty was recorded. He was then examined as a witness on the part of the prosecution against his co-defendant, and in the course of such examination he swore that he had no knowledge of the instrument in question being forged. Upon this he was allowed to withdraw his plea of guilty and to plead not guilty, the jury withdrawing their verdict. The trial of the other prisoner was then proceeded with, and on his acquittal, the one who had withdrawn his plea was put upon his trial. *Reg. v. Clouter and Heath*, 237.

#### RAILWAY.

A line of railway was constructed under the powers of an act of Parliament, and was intended for the conveyance of passengers in carriages drawn by steam engines, but at the time of the alleged offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of workmen and materials. A railway truck was placed by the prisoners across

the line, so as to obstruct the passage of any carriage and to endanger the safety of the persons therein, but its position was discovered, and the truck removed before any collision occurred:

Held, that the so placing the truck across the line was an offence within the 3 & 4 Vict. c. 97, s. 15, although the line was not completed and opened, and no actual obstruction took place. *Reg. v. Bradford and others*, 309.

#### RAPE.

The crime of rape is the having connection with a woman forcibly, where she neither consents before nor after (Stat. West. 2, 13 Edw. 1, c. 34):

Therefore, where a man had carnal knowledge of a girl (aged thirteen) of imbecile mind, and the jury found that it was by force, and without her consent, she being incapable of giving consent from defect of understanding, this was

Held to amount to the crime of rape, although the jury did not find the offence to have been against the will of the girl. *Reg. v. Fletcher*, 131.

S. was indicted for rape, and the evidence was, that he went into the bed where D.'s wife was asleep, and had connection with her, while she was asleep:

Held, that S. was not guilty of rape, inasmuch as such a crime implies that some force has been used to overcome the opposing will of the prosecutrix, and here no force was in fact used.

But held, by Lord President Macneill and Lord Ivory (who dissented), that the force essential to the crime of rape is relative to the resistance offered, and where there is no resistance to be overcome, it is not necessary to prove the use of force. *Reg. v. Charles Sweetie*, 223.

#### RECEIVING.

A pawnbroker's duplicate is the subject of larceny, either as a thing valuable in itself or as a warrant for the delivery of goods, within the 7 & 8 Geo. 4, c. 29, s. 5.

A conviction for receiving a pawnbroker's ticket knowing it to have been stolen, was therefore held to be good. *Reg. v. George Morrison*, 194.

The prisoner was indicted in the first count for larceny of certain goods; and in the second count for that he "the goods aforesaid, so as aforesaid feloniously stolen," feloniously did receive, &c. The prisoner was acquitted on the first count, but found guilty upon the second:

Held, that the conviction was valid, and that the second count might be construed to

mean stolen goods generally; and the part of the first count charging them to have been stolen by him, be treated as irrelevant. *Reg. v. Charles Huntley*, 260.

A., B. and B.'s wife were indicted jointly for burglary and receiving; the jury found A. guilty of burglary, and B. and his wife of receiving. Part of the property was found in B.'s house, and from that fact, and others, the jury were warranted in finding B. guilty of receiving. To connect the wife with the matter, it was proved that some time after the burglary the wife was seen dealing with part of the stolen things, when she made a statement importing a knowledge that the things had been stolen, and that they were to be made away with. The judge at the trial declined to leave it to the jury to find whether B.'s wife received the things from her husband or in his absence, and the jury found B.'s wife guilty of receiving:

Held, that the questions were proper for the consideration of the jury, and the conviction could not be supported. *Reg. v. Rachel Wardroper*, 284.

#### ROBBERY.

On a trial for robbery and stealing from the person, it was proved that the prosecutor, who was paralyzed, received whilst sitting on a sofa in his room a violent blow on the head from one of the prisoners, whilst the other went to a cupboard in the same room and stole therefrom a cash box:

Held, that it was a question for the jury whether the cash box was at the time under the protection of the prosecutor. If so, the charge of stealing from the person would be sustained. *Reg. v. Selway and Wynn*, 235.

#### SUMMARY CONVICTION.

The Manchester Improvement Act, 8 & 9 Vict. c. 141, s. 30, enacted that it should not be lawful to build any houses with their fronts facing each other which shall be separated from each other by a space less than twenty-four feet wide, excepting only on sites of houses built prior to the Act, and except on vacant plots in streets partially built upon on both sides.

A., the owner of land, built up to the boundary of his land, the same not being in a street, and sometime afterwards the defendant, the owner of the land in front of the houses built by A., built a stable within the prohibited distance in sect. 30 in front of A.'s houses:

Held, that the defendant was not prevented from so doing by sect. 30, as that

applied only to the erection of new streets. *Reg. v. John Sidebotham*, 206.

The surveyor of the roads directed trestles to be put at intervals on either side of a road, on which fresh granite had been laid, to confine the traffic to a particular part of it. A. drove his carriage against the trestles to knock them down, in alleged assertion of a right, he deeming the surveyor to have no power so to put the trestles for this object. One of the trestles was injured, and on a summons against A., under the Malicious Trespass Act, the justices convicted and fined A. 1s.

By a local act the justices were made vestrymen, and became interested in the property in the trestles, and also in the fine:

Held, first, that the justices had jurisdiction to convict; and secondly, that in order to obtain a *certiorari* to quash the conviction on the ground of the justices being interested, the party should show on the face of his affidavits that neither he nor his advocate before the justices knew of the objection at the time of the hearing. *Reg. v. The Justices of Richmond, Surrey*, 314.

A person was brought before a magistrate on a summons for being drunk and riotous in a public street, contrary to the statute 10 & 11 Vict. c. 89, s. 29, but the proof failing as to being riotous, the magistrate convicted him under the 21 Jac. c. 7, s. 3, and fined him 5s. for being drunk:

Held, that the conviction was bad, and that the defect in the summons was not cured by the 11 & 12 Vict. c. 43, s. 1. *Martin* (appellant) *v. Pridgeon* (respondent), 170.

See ASSAULT.

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## VENUE.

See WOUNDING.

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## WAY (OBSTRUCTION OF).

An indictment having been found against a party for the obstruction of an alleged right of way, defendant applied for a writ of *certiorari*, to remove said indictment from the criminal to the civil side of the court. The writ was granted, on the ground that a view jury was absolutely necessary in a case of this kind. *Reg. v. Magill*, 216.

## WEIGHTS AND MEASURES.

The 5 & 6 Will. 4, c. 63, s. 25, enacts "that any inspector knowingly stamping any

weights or measures of any person residing within the limits of any local jurisdiction for which another inspector may have been legally appointed," shall forfeit a sum not exceeding 20s. for every weight so stamped:

Held, that such prohibition applies to all inspectors of weights and measures, whether appointed by the authorities of a city or by the county justices, and forbids each of them from stamping weights or measures of persons residing within a district for which another inspector had been legally appointed. *Reg. v. Skellon*, 177.

## WORKMAN.

The 17 Geo. 3, c. 56, which relates to the unlawfully disposing of materials entrusted by masters to workmen to work up in their trades, by sect. 10 enacts, that if any such materials mixed or unmixed, wrought or unwrought, suspected to be purloined or embezzled, shall be found in any "dwelling-house, out-house, yard, garden, or other place or places," the person in whose house, &c., the same shall be found, if such person shall not give an account to the satisfaction of the justices how he came by the same, shall be guilty of a misdemeanor:

Held, that a warehouse, though not attached to or within a curtilage of a dwelling-house, was within the section. *Reg. v. Edmundson*, 212.

## WOUNDING.

A wife acting under the coercion of her husband, wrote letters to the prosecutor, pretending that she had become a widow, and requesting a meeting at a distant place. The meeting was granted, and the wife, dressed as a widow, met the prosecutor at the railway-station, and induced him to go to a lonely spot, where the husband fell upon and cudgelled the prosecutor very severely with a stick. Upon an indictment charging a wounding with intent to disfigure, and an assault with an intent to do grievous bodily harm, the jury found both the husband and wife guilty, but also found that the wife did not herself personally inflict any violence upon the prosecutor:

Held, that the conviction of the wife was wrong. The conviction was reversed accordingly. *Reg. v. Samuel Smith and Sarah his Wife*, 27.

Upon a count of an indictment of three prisoners, for feloniously wounding with intent to do grievous bodily harm, two were convicted of the felony, and the third of the misdemeanor of unlawfully wounding:

Semble, that it was competent to the jury to do so.

"The offence was committed on board an American ship, in the Penarth-roads, Bristol Channel, three quarters of a mile from the coast of Glamorganshire, at a spot never left dry by the tide, and lying between Glamorganshire and the Flat Holms (an island commonly treated as a part of the county of Glamorgan), the ship being at the time two miles from the island, on the inside; it was about ten miles to the opposite shore of Somersetshire, and ninety miles from the roads to the mouth of the Channel:

Held, that the part of the sea where the vessel was formed part of the county of Glamorgan, and that the venue "Glamor-

gan," in the indictment, was right. *Reg. v. Cunningham and two others*, 104.

Deposition of witness taken before magistrates allowed to be read at trial as evidence against him, although after his evidence was taken the magistrates committed him for trial, his evidence criminating himself. *Reg. v. Chidley and Cummins*, 365.

Upon a count for assaulting, beating, wounding, and occasioning actual bodily harm against the statute, the prisoner may be convicted of a common assault. *Reg. v. George Oliver*, 384.

*See ASSAULT.*

## APPENDIX.

## STATUTES.

- An Act for the Incorporation and Regulation of Joint Stock Companies and other Associations (s. 79), i.
- An Act to facilitate the Dispatch of Business before Grand Juries in England and Wales, i.
- An Act to amend the Act of the last session of Parliament for diminishing Expense and Delay in the Administration of Criminal Justice in certain cases, ii.
- An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property, iv.
- An Act to amend the Law relating to Probates and Letters of Administration in England (s. 28), vii.
- An Act to amend the Law relating to Divorce and Matrimonial Causes in England (s. 50), vii.
- An Act to amend the Law of False Pretences, viii.
- An Act to amend the Joint Stock Companies Acts, 1856 and 1857, and the Joint Stock Banking Companies Act, 1857 (ss. 6, 7, 20, 21), viii.
- An Act to amend the Law concerning the Powers of Stipendiary Magistrates and Justices of the Peace in certain Cases, ix.
- An Act to amend the Law relating to Cheques or Drafts on Bankers (ss. 3, 5), xii.
- An Act to regulate the Qualifications of Practitioners in Medicine and Surgery (ss. 38, 39), xiii.
- An Act more effectually to prevent Danger to the Public Health from Places of Burial, xxv.
- An Act to enable the Judges to appoint Commissioners within Ten Miles of London and in the Isle of Man and the Channel Islands to administer Oaths in Common Law, and to authorize the taking in the Country of Bail in Error, and Recognizances and Bail on the Revenue Side of the Exchequer, xxvi.
- An Act to provide for taking Evidence in Suits and Proceedings pending before Tri-

bunals in Her Majesty's Dominions in Places out of the Jurisdiction of such Tribunals, xxvii.

An Act to amend the Law concerning the Remission of Penalties, xxviii.

An Act to enable Coroners in England to admit to Bail Persons charged with Manslaughter, xxix.

An Act to amend and explain an Act of the Sixth Year of the Reign of King George the Fourth, to repeal the Laws relating to the Combination of Workmen, and to make other Provisions in lieu thereof, xxx.

An Act to amend the Law relating to Municipal Elections, xxxi.

## MISCELLANEOUS PRECEDENTS.

No.

1. Indictment for conspiracy between bankrupt and others, feloniously and clandestinely to remove and conceal goods of said bankrupt, with intent to defeat creditors; with counts for conspiring fraudulently to procure goods from tradesmen, with the intent eventually of so removing and concealing them, xiv.
2. Indictment under the 253rd section of the Bankrupt Law Consolidation Act, against a bankrupt for having, under the false pretence of carrying on business in the ordinary course of trade, obtained, within three months of the bankruptcy, goods on credit, with intent to defraud the owner thereof, xvii.
3. Indictment against bankrupt and others for feloniously concealing and embezzling the personal estate of the bankrupt, to the value of 10*l.* and upwards, with intent to cheat and defraud the creditors, under the 251st section of the Bankrupt Law Consolidation Act; with counts charging the bankrupt as principal, and the other defendants as being present, aiding and abetting, xx.











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